Supreme Court, U.S.
FILED

001615 APR 23 2001

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No. 00-

In the Supreme Court of the United States

DIXIE DISTRIBUTING COMPANY; HARRY C. DENUNE

Petitioners,

v.

CARTER-JONES LUMBER CO.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether it is permissible under *United States* v. *Bestfoods*, 524 U.S. 51 (1998), to determine the question of indirect, derivative CERCLA liability by examining the relationship between a shareholder of a corporation and the acts of pollution, rather than the relationship between the shareholder and the corporation generally.

2. Whether a federal court should certify an issue of state law to the state supreme court in circumstances in which there is some persuasive authority from the state intermediate appellate courts, but the only authority from the state supreme court seems at least implicitly to contradict the appellate court opinions.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioners state that they have no parent companies and there are no publicly held corporations holding more than 10% of their stock.

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OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 237 F.3d 745. The opinion of the district court (App., *infra*, 13a-24a) is unreported. The prior opinion of the court of appeals (App., *infra*, 25a-36a) is reported at 166 F.3d 840. The prior opinion of the district court (App., *infra*, 37a-68a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 23, 2001. The court of appeals denied rehearing on March 16, 2001. App., *infra*, 74a-75a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended, 42 U.S.C. §§ 9607(a) & 9613(f)(1), are reproduced at App., *infra*, 76a-78a.

STATEMENT

This case, which arises under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended, 42 U.S.C. §§ 9601 *et seq.*, warrants this Court's review in two important respects. First, the decision below utterly eviscerates the distinction between direct and indirect CERCLA liability that formed the very heart of this Court's recent decision in *United States* v. *Bestfoods*, 524 U.S. 51 (1998). Second, the Sixth Circuit violated core principles of federalism and comity by refusing to afford the Supreme Court of Ohio the opportunity to resolve an important issue of state law in circumstances in which other circuits have

found certification to be necessary. The Court should grant certiorari to resolve the conflict among the circuits and to vindicate *Bestfoods*.

1. Petitioners are Dixie Distributing Company (Dixie) and its sole shareholder, Harry C. Denune. Dixie is an Ohio corporation that has engaged in the legitimate businesses of selling motorcycle parts and purchasing machinery at auction for sale. App., *infra*, 3a. It has had between 20 and 25 employees in Columbus and Springfield, Ohio. *Ibid.* It held annual meetings of its board of directors and of its shareholders every year from 1985 to 1999 and several special meetings in 1995. App., *infra*, 4a. Denune served as director through 1989. *Ibid.* He did not commingle personal and corporate funds, and the corporation was sufficiently capitalized at all relevant times. *Ibid.*

Although Denune exercised significant control over the affairs of Dixie, by no means did he control every aspect of the corporation's affairs or every transaction in which the corporation engaged. *Ibid.* For instance, Dixie's employees handled the company's payroll and petty cash accounts and the management of its motorcycle parts sales. *Ibid.*

In October 1985, Dixie purchased a number of transformers containing polychlorinated biphenyls (PCBs). App., *infra*, 26a. In June 1987, Dixie sold several of the contaminated transformers to Top Dollar Liquidators (Top Dollar). App., *infra*, 27a. There was testimony at trial suggesting that Denune entered into an agreement with a principal at Top Dollar to hide the transformers from the Ohio Environmental Protection Agency (OEPA). *Ibid.* Top Dollar moved the transformers to a facility in Columbus at night without a permit. *Ibid.* The transformers were then moved to another property in Columbus, leased by Top Dollar from respondent Carter-Jones Lumber

Company (Carter-Jones). *Ibid.* The transformers remained locked and stationary in a trailer on that property for approximately one year. *Ibid.*

In July 1988, the OEPA received a citizen complaint notifying it of the presence of the transformers on Carter-Jones' property. *Ibid.* OEPA conducted an inspection and discovered the transformers, which had begun to leak. App., *infra*, 27a-28a. OEPA then took steps to have the site cleaned. App., *infra*, 28a. In July 1990, Carter-Jones entered into a Consent Order to clean up the property, and it ultimately incurred cleanup costs of over $3 million. App., *infra*, 29a.

2. In 1992, Carter-Jones initiated this private cost-recovery action against Dixie and Denune (and other defendants not parties to this appeal) pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613(f), which entitles a person who incurs cleanup costs to bring a contribution action in federal court against the responsible parties. After a bench trial, the district court found that both Dixie and Denune had "arranged for disposal" of hazardous substances and were therefore liable for cleanup costs under 42 U.S.C. § 9607(a)(3). App., *infra*, 49a-54a. The district court apportioned 50% of the liability for the costs to Dixie and 30% to Denune. App., *infra*, 56a-60a. The district court initially found Dixie and Denune to be jointly and severally liable (App., *infra*, 67a, 69a-70a), but upon petition for reconsideration it amended its order to make them severally liable only (App., *infra*, 71a-73a).

On appeal, the Sixth Circuit affirmed in part, reversed in part, and remanded. App., *infra*, 25a-36a. Applying this Court's decision in *Bestfoods* — which had issued during the pendency of the appeal — the Sixth Circuit concluded that the district court properly held Denune personally liable for a portion of the cleanup costs because *Bestfoods* establishes that

a corporate shareholder can be held directly liable for acts of pollution if the shareholder was directly and personally involved in the wrongful acts, as the evidence indicated here. App., *infra*, 32a-34a (citing *Bestfoods*, 524 U.S. at 55).

The Sixth Circuit declined to decide whether joint and several liability could be imposed under federal common law to put Denune on the hook for Dixie's portion of the cleanup costs as well, because it concluded that application of Ohio veil-piercing law might well render the issue academic. App., *infra*, 34a-36a. The court noted that *Bestfoods* holds that, in addition to incurring *direct* liability for his own wrongdoing, a shareholder can incur *indirect*, derivative liability for the corporation's wrongdoing if he so controlled the corporation as to warrant veil-piercing under the common law. 524 U.S. at 55. Thus, the Sixth Circuit reasoned, if the corporate veil could be pierced under Ohio law, Denune would be liable for both his own and Dixie's share of the cleanup costs, and there would be no need to determine whether CERCLA provides for joint and several liability. App., *infra*, 34a-36a. Because the district court had not considered the veil-piercing issue, the Sixth Circuit remanded for further proceedings. App., *infra*, 36a.

3. On remand, the district court conducted an evidentiary hearing and ruled that the corporate veil could be pierced under Ohio law, and therefore that Denune was jointly liable for the award against Dixie. App., *infra*, 13a-24a. The court noted that Ohio law does not allow veil piercing unless the corporation had "no separate mind, will, or existence of its own" — a standard that seemingly cannot be met here, given Dixie's significant independent existence — but it found that test to be satisfied because Denune controlled and directed the *specific wrongful transactions* to such a degree that the corporate will was overcome *with respect to those transactions only*. App., *infra*, 19a.

The Sixth Circuit affirmed. App., *infra*, 1a-12a. The court of appeals took note of the leading Ohio case on veil-piercing, *Belvedere Condominium Unit Owners' Ass'n* v. *R.E. Roark Cos.*, 617 N.E.2d 1075 (Ohio 1993), in which the Ohio Supreme Court promulgated a three-pronged test that must be met to pierce the corporate veil:

> "• control over the corporation by those to be held liable was so complete that the corporation had no separate mind, will, or existence of its own;
>
> • control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity; and
>
> • injury or unjust loss resulted to the plaintiff from such control and wrong."

App., *infra*, 6a (quoting *Belvedere*, 617 N.E.2d at 1086).

Because the district court's fact findings place the second and third prongs beyond dispute, this case turns, as the district court had determined, on the first prong: whether the "control over the corporation by those to be held liable was so complete that the corporation had no separate mind, will, or existence of its own."

The Sixth Circuit freely acknowledged that "Denune did *not* control every aspect of Dixie's affairs or every transaction" into which Dixie entered. App., *infra*, 4a (emphasis added). Indeed, as noted above (at page 2), it is undisputed that Dixie maintained a vigorous and legitimate existence outside of Denune. Thus, the question before the court of appeals was whether the district court was correct in holding that the first prong of the *Belvedere* test could be met by considering "only the extent of Denune's control of the illegal transaction at issue

in the underlying lawsuit," rather than Denune's control over Dixie's affairs generally. App., *infra*, 7a.

Although the Ohio Supreme Court has never addressed that question, and notwithstanding the fact that the plain language of the *Belvedere* test strongly suggests that it would answer it in the negative, the Sixth Circuit declined without comment petitioners' request to certify this important issue to the State's highest court. App., *infra*, 3a, 12a. Rather, the court of appeals chose to divine an answer on its own from two decisions of Ohio's intermediate appellate courts: *Janos* v. *Murduck*, 672 N.E.2d 1021 (Ohio Ct. App. 1996), in which the Ohio court "focused on control of the single transaction at issue in the case" (App., *infra*, 10a); and *Sintel, Inc.* v. *Budget Systems*, No. 74249, 1999 WL 401409 (Ohio Ct. App. June 17, 1999), which "contains some indication that control of the particular transaction at issue, rather than control of the corporation more generally, is important to the Ohio courts" (App., *infra*, 10a n.6).

Relying on *Janos* and *Sintel*, the court of appeals upheld the district court's conclusion that the corporate veil could be pierced based *solely* on the fact that Denune "controlled the particular transactions that constituted the CERCLA violations for which Dixie was found liable." App., *infra*, 4a. The Sixth Circuit rejected petitioners' argument that basing indirect, derivative CERCLA liability on the degree of control over the wrongful transaction, rather than the degree of control over the corporation as a whole, violates *Bestfoods* by eradicating the distinction between direct and indirect liability that this Court took pains to draw:

> In *Bestfoods*, a unanimous Court held that mere control of a corporation was not enough to impose direct CERCLA liability on the shareholder, but that

> derivative liability could exist if the corporate veil could be pierced. See *Bestfoods*, 524 U.S. at 55. Denune argues that the district court here wrongly focused its attention on the relationship between him and the act of wrongdoing rather than on the relationship between him and Dixie. In other words, he argues that the court wrongly applied the test for direct liability to determine whether indirect liability existed.
>
> This argument misses the point of *Bestfoods*. The Supreme Court makes it clear that courts should continue to look to the common law to determine whether to hold a corporate shareholder personally liable for the acts of the corporation in the CERCLA context. See *Bestfoods*, 524 U.S. at 63-64. The fact that Ohio common law, in this case, allows veil piercing under roughly the same conditions that CERCLA imposes direct liability is a coincidental fact about Ohio law.

App., *infra*, 10a-11a.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's decision raises two important issues that warrant this Court's review.

First, by expressly basing its analysis of whether to impose derivative CERCLA liability on the relationship between the shareholder and the wrongful acts, instead of the relationship between the shareholder and the corporation, the Sixth Circuit has blatantly run afoul of this Court's decision in *Bestfoods*. Indeed, the entire thrust of the *Bestfoods* opinion was an admonition to the courts of appeals to stop confusing direct and indirect liability and to adhere to the cardinal principle that the relationship between the shareholder and the wrongful acts is

relevant only to the issue of *direct* liability; the test for *indirect* liability must focus instead on the relationship between the shareholder and the corporation generally. See 524 U.S. at 67. The Court should grant certiorari to clarify and reinforce the distinction between direct and indirect liability.

Second, by refusing to certify the dispositive issue of Ohio law to the Supreme Court of Ohio, the Sixth Circuit has created a conflict among the federal courts of appeals. As the Second Circuit and other courts of appeals have recognized, core principles of federalism and comity necessitate certification where, as here, the only decisions ostensibly on point are those of the state's intermediate appellate courts, and the general language of the opinions of the state supreme court — which has not squarely addressed the issue — casts some doubt on the holdings of the state's intermediate appellate courts. See *Liriano* v. *Hobart Corp.*, 132 F.3d 124, 132 (2d Cir. 1998); *Grubbs* v. *Gulf Int'l Marine, Inc.*, 985 F.2d 762, 763 (5th Cir. 1993); *In re KF Dairies, Inc.*, 179 F.3d 1226, 1226-27 (9th Cir. 1999); *Blanchard* v. *State Farm Mut. Ins. Co.*, 903 F.2d 1398, 1399 (11th Cir. 1990). Indeed, the failure to certify in these circumstances has the functional effect of funneling litigation into federal court and depriving the state's highest court of its ability to articulate and develop state law. See *Todd* v. *Societe BIC, S.A.*, 9 F.3d 1216, 1222 (7th Cir. 1993) (en banc); *McCarthy* v. *Olin Corp.*, 119 F.3d 148, 157-58 (2d Cir. 1997) (Calabresi, J., dissenting).

The Court should grant certiorari to resolve this conflict among the circuits and to consider the federalism implications of federal courts' aggregating unto themselves the power to make state policy.

I. The Sixth Circuit's Decision Is Squarely Inconsistent With *Bestfoods*

Notwithstanding its protests to the contrary, the Sixth Circuit's ruling is fundamentally inconsistent with this Court's decision in *Bestfoods*.

In *Bestfoods*, the Court articulated two distinct paths to shareholder liability under CERCLA — direct liability for the shareholder's own acts and derivative liability for the acts of the corporation — and it made clear that it would not tolerate the "fusion of direct and indirect liability." 524 U.S. at 67. Rather, "direct liability for the [shareholder's active participation in the acts of pollution] is to be kept distinct from derivative liability for the [corporation's own actions]." *Ibid.* Thus, "*the focus of the enquiry must necessarily be different under the two tests.*" *Id.* at 67-68 (emphasis added). Indirect liability — that is, derivative liability — looks to the relationship between the shareholder and the corporation generally. *Ibid.* Any analysis of the relationship between the shareholder and the specific acts of pollution, on the other hand, goes only to the question of direct liability. *Ibid.*

Yet in the instant case, the Sixth Circuit freely conceded that it determined the question of indirect liability by examining "the relationship between [the shareholder] and the act of wrongdoing rather than * * * the relationship between [the shareholder] and [the corporation]." App., *infra*, 11a. That is a blatant violation of *Bestfoods*.

The Sixth Circuit defended its actions by claiming that *Bestfoods* "makes it clear that courts should continue to look to the common law to determine whether to hold a corporate shareholder personally liable for the acts of the corporation in the CERCLA context," and "[t]he fact that Ohio common law, in this case, allows veil piercing under roughly the same

conditions that CERCLA imposes direct liability is a coincidental fact about Ohio law." *Ibid.*

That analysis is mistaken. *Bestfoods* holds that there are two ways to determine shareholder liability under CERCLA: (1) by examining the shareholder's control over the wrongful acts to determine whether the shareholder is *directly* liable for those acts; and (2) by examining the shareholder's control over the corporation as a whole to determine whether the shareholder is *indirectly* liable for any and all wrongful corporate acts. 524 U.S. at 67.

CERCLA incorporates the common law in fashioning the contours of the second inquiry. But, by definition, the common law rule that is being incorporated is the test to determine whether the shareholder so controls the corporation that he can be held liable for all wrongful corporate acts. That, and nothing more, is the inquiry required by *Bestfoods*. Even if state common law allows transaction-specific veil piercing, as the Sixth Circuit interpreted Ohio law to allow here, CERCLA does not incorporate that rule, since, as *Bestfoods* explains, the relationship between the shareholder and the transaction is relevant only to CERCLA's direct liability inquiry and *must not be examined* in determining derivative liability. 524 U.S. at 67. See also *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 97-99 (1991) (federal statutes that implicitly incorporate rules of state corporation law do not incorporate those particular rules that are inconsistent with federal law or policy).

The Sixth Circuit refused to accept this analysis because it expressed concern that petitioners'

> argument, if we adopted it, would straightjacket the courts in situations where equity demands that the fiction of corporate personhood be ignored. Consider, for example, a case in which a corporation with a single

> shareholder kept immaculate corporate records, observed all the formalities required by corporate law, and was adequately capitalized. The shareholder never commingled funds, and never held himself out as personally liable for the corporation's debts. The corporation even does some legitimate business. Can it be that the shareholder is immunized from personal liability if he causes the corporation to commit an illegal act, no matter the degree of his control over the corporation with regard to the illegal act, no matter the harm to third parties, and no matter the other equities?

App., *infra*, 8a.

But in fact, this Court has already considered precisely that situation. In *Bestfoods*, the Court explained in a parenthetical that

> [t]here are instances in which the parent has not sufficiently overstepped the bounds of corporate separateness to warrant piercing, yet is involved enough in the facility's activities that it should be held liable as an operator. Imagine, for example, a parent who strictly observed corporate formalities, avoided intertwining officers and directors, and adequately capitalized its subsidiary, yet provided active, daily supervision and control over hazardous waste disposal activities of the subsidiary. Such a parent should not escape liability just because its activities do not justify a piercing of the subsidiary's veil.

524 U.S. at 66 n.12 (internal quotation marks and ellipses omitted). As the Court explained, this scenario calls for holding the shareholder *directly* liable for his involvement in the wrongful transactions. It does not warrant *indirect* liability.

In the instant case, the district court has already found that, because of his personal involvement in the wrongful acts, Denune is directly liable for 30% of the cleanup costs. That is the very result contemplated in *Bestfoods*, and it ensures that Denune cannot use the corporate form to escape personal liability. But to hold Denune liable also for Dixie's portion of the costs based on the *exact same* personal involvement, notwithstanding the fact that he did not generally control the corporation to a degree sufficient to pierce the corporate veil, is to disregard the holding of *Bestfoods* and to conflate the two theories of liability that this Court took pains to separate. Indeed, if a shareholder can be derivatively liable for controlling the wrongful acts of a corporation, there is no need for direct liability analysis at all. Cf. *Bestfoods*, 524 U.S. at 70 ("Indeed, if the evidence of common corporate personnel acting at management and directorial levels were enough to support a finding of a parent corporation's direct operator liability under CERCLA, then the possibility of resort to veil piercing to establish indirect, derivative liability for the subsidiary's violations would be academic.").

It was the lower courts' failure to distinguish properly between direct and indirect liability that prompted this Court to intervene in *Bestfoods* in the first place. See 524 U.S. at 60, 67-68. If the Court does not do the same here, the central holding of *Bestfoods* will be gutted, and confusion will once again reign in the circuits. The Court should grant certiorari to avoid that result. See Sup. Ct. R. 10(a).

II. The Sixth Circuit Has Created A Conflict Among The Courts Of Appeals On The Question Whether Certification Is Appropriate In These Circumstances

Leaving aside the question whether transaction-specific indirect CERCLA liability is even permissible under *Bestfoods*,

the Sixth Circuit defied core principles of federalism and comity by relying solely on Ohio intermediate appellate court opinions to recognize such a theory of liability without first certifying the question to the Ohio Supreme Court, which has not yet addressed the issue and, if anything, has indicated an unwillingness to sanction it. The same result would not have ensued in numerous other circuits.

This Court has long recognized that certification "helps build a cooperative judicial federalism." *Lehman Bros.* v. *Schein*, 416 U.S. 386, 391 (1974). In furtherance of federalism principles, certification places "state law questions in [the only] courts equipped to rule authoritatively on them." *Arizonans For Official English* v. *Arizona*, 520 U.S. 43, 75-76 (1997). By certifying, a federal court ensures that it does not usurp the state courts' function in establishing state policy. By contrast, a federal court that does not certify when faced with a difficult issue of state law that has not been resolved by the state's highest court "make[s] important state policy, in contravention of basic federalism principles." *Hakimoglu* v. *Trump Taj Mahal Assocs.*, 70 F.3d 291, 302 & n.9 (3d Cir.1995) (opinion of Becker, J.). "When * * * a federal court fails to certify, the highest court of the state is denied the right to decide whether it wishes to resolve the issue. The loser loses because a court that has no ultimate say as to the applicable law has made itself into a court of last resort." *McCarthy* v. *Olin Corp.*, 119 F.3d 148, 159 n.4 (2d Cir. 1997) (Calabresi, J., dissenting). "When federal courts, in effect, prevent state courts from deciding unsettled issues of state law, they violate fundamental principles of federalism and comity." *Id.* at 158.

With these concerns in mind, the Second Circuit has explicitly held that "[c]ertification is particularly appropriate when * * * there is some law in the intermediate state courts, but no definitive holding from the state's highest tribunal."

Liriano v. *Hobart Corp.*, 132 F.3d 124, 132 (2d Cir. 1998) (citing and endorsing Judge Calabresi's dissent in *McCarthy*, *supra*). See also *McCarthy*, 119 F.3d at 161 (Calabresi, J., dissenting) (certification is necessary in "virtually any case in which 1) a significant and dispositive issue of state law is in genuine doubt (despite the existence of non-binding lower court decisions, especially where those decisions * * * were never appealed to the state's highest court), and 2) certification is specifically requested by the party that did not invoke federal court jurisdiction").

That is precisely the situation here. There is absolutely no indication in the precedents of the Ohio Supreme Court that the veil-piercing inquiry should turn on the degree of control exercised by the shareholder over the wrongful transaction. The only Ohio cases relied upon by the Sixth Circuit to support its conclusion that the corporate veil can be pierced when the shareholder exercised control over the single transaction at issue in the case are *Janos* v. *Murduck*, 672 N.E.2d 1021 (Ohio Ct. App. 1996), and *Sintel, Inc.* v. *Budget Systems*, No. 74249, 1999 WL 401409 (June 17, 1999), both decisions of Ohio's intermediate appellate courts that were never appealed to the Ohio Supreme Court. See App., *infra*, 9a-10a & n.6.

It is true that some courts and commentators have appeared to endorse the control-over-the-transaction-alone test adopted by the Sixth Circuit. See, *e.g.*, *Angelo Tomasso, Inc.* v. *Armor Constr. & Paving, Inc.*, 447 A.2d 406 (Conn. 1982); FLETCHER CYC CORP § 41.10. But others clearly have not. For instance, New York courts have held that "a party seeking to pierce the corporate veil must plead and prove * * * complete dominion and control of the [corporation] by the [shareholder], *not only generally, but [also] with respect to the transaction at issue*." *Eastern States Elec. Contractors, Inc.* v. *William L. Crow Constr. Co.*, 544 N.Y.S.2d 600, 602 (N.Y. App. Div. 1989)

(emphasis added). Many other courts have also emphasized that the shareholder must exercise control over the corporation's affairs generally, not just its actions in a specific incident. See, *e.g.*, *In re Rehabilitation of Centaur Ins. Co.*, 632 N.E.2d 1015, 1017 (Ill. 1994) (corporate veil may be pierced only "where a [corporation] is organized and controlled, and its affairs conducted by a [shareholder]"); *Keith* v. *Woodul*, 616 S.W.2d 375, 377 (Tex. Civ. App. 1981) (corporate veil may be pierced only "where an individual controls and manages the corporation in such a manner that its affairs are indistinguishable from the individual's personal affairs, and it has thus become his alter ego").

The Ohio Supreme Court's precedents strongly suggest an inclination to side with those courts that have *not* adopted a control-over-the-transaction-alone test. As noted above, in *Belvedere Condominium Unit Owners' Ass'n* v. *R.E. Roark Cos.*, 617 N.E.2d 1075 (Ohio 1993) — which the Sixth Circuit acknowledged to be the Ohio Supreme Court's leading decision on veil-piercing (App., *infra*, 6a) — the court held that

> the corporate form may be disregarded when *(1) domination and control over the corporation by those to be held liable is so complete that the corporation has no separate mind, will, or existence of its own;* (2) that domination and control was used to commit fraud or wrong or other dishonest or unjust act, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong.

617 N.E.2d at 1086 (emphasis added; internal quotation marks omitted). The requirement of control over the specific transaction is seemingly encompassed within the second prong of the *Belvedere* test. The first prong — which also must be met in every case — requires *in addition* complete control over

the entire existence of the corporation. Thus, the *Belvedere* court made clear that "to succeed a plaintiff must show that the individual and the corporation are fundamentally indistinguishable." *Ibid.*

It is true that one cannot determine with certainty from this language that the Ohio Supreme Court would reject the test adopted by the Sixth Circuit here. But it is equally indisputable that this language calls into significant question whether the Sixth Circuit reached the right result. In these circumstances — where the case presents a dispositive issue of state law that has divided courts across the country and has not yet been resolved by the state supreme court, though there is some potentially relevant authority from the state intermediate appellate courts, which authority conflicts with indications to the contrary in the opinions of the state s high court — certification is essential.

As Judge Calabresi has explained, "[i]n such cases, and in the absence of certification, the party that is favored by the lower court decisions will almost invariably seek federal jurisdiction. It will do this in order to prevent the state's highest court from reaching the issue, in the expectation that the federal court — unlike the state's highest court — will feel virtually bound to follow the decisions of the intermediate state courts." *McCarthy*, 119 F.3d at 157-58 (dissenting opinion).[1] In other words, as the Seventh Circuit has explained, if the federal courts answer the question themselves rather then certifying to the state supreme court, the result is to "funnel all similar

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[1] Indeed, the Sixth Circuit has adopted a rule that, "where a state appellate court has resolved an issue to which the high court has not spoken," the Circuit will "normally treat those decisions as authoritative." *Kurczi* v. *Eli Lilly & Co.*, 113 F.3d 1426, 1429 (6th Cir. 1997) (internal quotation marks, brackets, and ellipsis omitted).

litigation [in]to federal court." *Todd* v. *Societe BIC, S.A.*, 9 F.3d 1216, 1222 (7th Cir. 1993) (Easterbrook, J.) (en banc).

> If the federal court treats the plaintiff more favorably than the state tribunal [might], then the plaintiff always files in federal court; similarly any departure in the [defendant's] favor leads the defendant to remove any suit filed in state court. In either case, the state loses the ability to develop or restate the principles that it believes should govern the category of cases. Certification then ensures that the law we apply is genuinely *state* law.

Ibid.[2] The failure to certify in these circumstances thus has the functional effect of giving the federal courts the final word on an issue of state law and policy.

Reflecting this concern, Rule 18 of the Ohio Supreme Court Rules of Practice expressly states that certification is warranted whenever there is no controlling precedent from the State's *highest court*. See Ohio S. Ct. Prac. R. 18 § 1 ("This rule may be invoked when the certifying court, in a proceeding before it, determines there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of this Supreme Court, and issues a certification order.").

Yet the Sixth Circuit refused to certify, thus depriving the Supreme Court of Ohio of the opportunity to establish a

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[2] In this regard, the failure to certify leads to the very forum shopping that *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64, 73-77 (1938), was intended to prevent. See *Hanna* v. *Plumer*, 380 U.S. 460, 468 (1965) (noting that one of the aims of the *Erie* decision was "discouragement of forum-shopping"); *McCarthy*, 119 F.3d at 157 (Calabresi, J., dissenting).

fundamental rule of corporate law — a rule that will have significant impact on the public policy of the State of Ohio.

Had this case arisen in the Second Circuit, these very concerns would have led the court to certify to the Ohio Supreme Court. Indeed, this is *precisely* the situation in which the Second Circuit has recognized the necessity to certify. See *Liriano*, 132 F.3d at 132; *McCarthy*, 119 F.3d at 161 (Calabresi, J., dissenting).

The Fifth and Ninth Circuits also would have certified here. See *Grubbs* v. *Gulf Int'l Marine, Inc.*, 985 F.2d 762, 763 (5th Cir. 1993) (certifying where there were two decisions on point from the state intermediate appellate courts, but no controlling decision from the state supreme court, and the state supreme court's precedents in related cases appeared to be in some tension with the lower court rulings); *In re KF Dairies, Inc.*, 179 F.3d 1226, 1226-27 (9th Cir. 1999) (same).

So too would the Eleventh Circuit. See *Blanchard* v. *State Farm Mut. Ins. Co.*, 903 F.2d 1398, 1399 (11th Cir. 1990) ("The district court, applying existing Florida intermediate appellate law, dismissed plaintiffs-appellants' complaint because it decided that joinder of the bad faith claim with the underlying contractual action was mandatory. We have determined that this question of Florida law is dispositive of this case and that there is no controlling precedent from the Supreme Court of Florida; we, therefore, certify this question to the Florida Supreme Court for resolution."). The Eleventh Circuit has held that, "[w]here there is *any doubt* as to the application of state law, a federal court should certify the question to the state supreme court to avoid making unnecessary *Erie* 'guesses' and to offer the state court the opportunity to interpret or change existing law." *Colonial Properties, Inc.* v. *Vogue Cleaners, Inc.*, 77 F.3d 384, 387 (11th

Cir. 1996) (emphasis added; internal quotation marks and footnote omitted). It can hardly be suggested that that liberal standard is not met here.

By refusing to certify, the Sixth Circuit has brought itself into conflict with these other circuits. See also *Reasbeck* v. *Wheeling Pittsburgh Steel Corp.*, No. 99-3441, 2000 WL 1434582, at **3 (6th Cir. Sept. 18, 2000) (unpublished) (explicitly declaring that the Sixth Circuit will not certify to a state supreme court where there are decisions on point from the state's intermediate appellate courts).

Indeed, the conflict runs even deeper — and the Sixth Circuit's decision is even more disturbing — when one considers the fact that there are some decisions of the Ohio intermediate appellate courts that cut heavily *against* the test the Sixth Circuit distilled from other Ohio appellate opinions. For instance, in *Willoway Nurseries* v. *Curdes*, No. 98CA007109, 1999 WL 820784 (Ohio Ct. App. Oct. 13, 1999), an Ohio appellate court interpreted the Ohio Supreme Court's decision in *Belvedere* thusly:

> The basis of the *Belvedere* test is the alter ego doctrine. "[T]o succeed a plaintiff must show that the individual and the corporation are fundamentally indistinguishable." The factors used to determine if this standard has been met include: (1) whether corporate formalities were observed; (2) whether corporate records were kept; (3) whether corporate funds were commingled with personal funds; and (4) whether corporate property was used for a personal purpose. *LeRoux's Billyle Supper Club* v. *Ma*, 602 N.E.2d 685 (Ohio Ct. App.1991).

1999 WL 8207894, at *4 (some citations omitted). See also App., *infra*, 7a (collecting Ohio appellate cases that post-date

Belvedere and continue to use this multi-factor test). These factors all concern the general degree of control exercised by the shareholder over the corporation, not the degree of control exercised by the shareholder over the particular transaction. As such, they indicate that the focus under Ohio law must be placed on the relationship between the shareholder and the corporation. See also, *e.g.*, *Kays* v. *Sheregardus*, 740 N.E.2d 1123, 1127 (Ohio Ct. App. 2000).

Where, as here, there are potentially conflicting decisions of the intermediate state appellate courts, other circuits have not hesitated for a moment to certify. See, *e.g.*, *Bocre Leasing Corp.* v. *General Motors Corp.*, 20 F.3d 66, 68 (2d Cir. 1994); *Kelley* v. *Integon Indem. Corp.*, 726 F.2d 1519, 1520 (11th Cir. 1984). The decision below, which reflects the Sixth Circuit's practice of refusing to certify in circumstances such as this, is irreconcilable both with these cases and with core principles of federalism.

In sum, this case presents a fundamental and tremendously important issue that has divided the courts of appeals. This Court should grant certiorari to resolve the conflict and, as in *Lehman Bros.*, to emphasize the importance of certification to principles of federalism. See S. Ct. R. 10(a).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2001

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 99-4241
CARTER-JONES LUMBER COMPANY.
Plaintiff-Appellee.

v.

LTV STEEL COMPANY, ET AL.,
Defendants,

DIXIE DISTRIBUTING COMPANY, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Ohio at Columbus.
No. 92-01161—Edmund A. Sargus, Jr., District Judge.

Argued: September 22, 2000
Decided and Filed: January 23, 2001

Before: BOGGS and SUHRHEINRICH, Circuit Judges; ALDRICH, District Judge.(*)

OPINION

ALDRICH, District Judge. The underlying facts of this case are set forth in our earlier opinion, *Carter-Jones Lumber Co. v. Dixie Distrib. Co.*, 166 F.3d 840 (6th Cir. 1999). There, we

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* The Honorable Ann Aldrich, United States District Judge for the Northern District of Ohio, sitting by designation.

affirmed the district court's judgment holding the Dixie Distributing Company ("Dixie") liable under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") for fifty percent of the response costs incurred by the plaintiff ("Carter-Jones") in the clean-up of a polluted site near Columbus, Ohio. We also affirmed the judgment holding Dixie's sole shareholder, Harry C. Denune ("Denune"), liable for thirty percent of the response costs. We reversed the district court's judgment that Denune was not jointly liable for the judgment against Dixie and remanded on the question whether Denune could be jointly liable on a veil-piercing theory. We directed the district court to consider the question in light of *United States v. Bestfoods*, 524 U.S. 51 (1998), which had been decided after the district court entered its judgment.

On remand, the district court conducted an evidentiary hearing and ruled that under Ohio law,[1] Denune was jointly

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[1] In *Bestfoods*, the Supreme Court left open the question whether state common law or federal common law should apply to veil-piercing claims in actions to enforce CERCLA's indirect liability provisions. *See Bestfoods*, 524 U.S. at 64 n. 9. In *United States v. Cordova Chem. Co.*, 113 F.3d 572 (6th Cir. 1997), the case on review in *Bestfoods*, Judge Merritt, in his concurrence, argued that the need for uniformity in this area of law suggested that federal common law should apply. *See Cordova, supra* at 584-85 (Merritt, J., concurring in part and dissenting in part). However, the parties to this case have not argued the question. At least one of our cases prior to *Bestfoods* favors the application of state common law in veil-piercing claims under CERCLA. *See Donahey v. Bogle*, 129 F.3d 838, 843 (6th Cir. 1997), *vacated on other grounds*, 524 U.S. 924 (1998), *reinstated*, 2000 U.S. App. LEXIS 16192 (Jul. 7, 2000); *see also AT&T Global Info. Solutions Co. v. Union Tank Car Co.*, 29 F. Supp. 2d 857, 865 (S.D. Ohio 1998). Because our opinion

liable for the award against Dixie. This appeal followed. Dixie and Denune (hereinafter, simply "Denune") argue that the district court erred in finding that under Ohio law, Denune was jointly liable, and that the district court abused its discretion by permitting new evidence to be introduced on remand. Denune also moved to certify a question of law to the Supreme Court of Ohio. For the reasons given below, we now affirm the district court's judgment and deny Denune's motion.

1. Facts Relevant To Veil-Piercing

Dixie was incorporated in Ohio under the name Chain Corporation of America in 1963. Denune and two others acted as incorporators. The corporation, under its new name, is still in good standing upon the records of the office of the Ohio Secretary of State. Denune is the sole shareholder.

In addition to its illegal business involving used electrical transformers containing PCBs, Dixie engaged in legitimate business. It sold motorcycle parts and purchased machinery at auction for sale. It had between twenty and twenty-five employees in Columbus and Springfield. While Denune

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remanding the case suggested that Ohio law should govern, *see Carter-Jones Lumber Co. v. Dixie Distributing Co.*, 166 F.3d at 847, we find no reason to depart from our holding in *Donahey*. In any case, we doubt that the outcome of this case would be any different if we applied federal common law, as "the rule in federal cases is founded only on the broad principle that a corporate entity may be disregarded in the interests of public convenience, fairness and equity," *Brotherhood of Locomotive Eng'rs v. Springfield Terminal Ry. Co.*, 210 F.3d 18, 26 (1st Cir. 2000) (citations and internal quotation marks omitted), and as federal common law generally "gives less respect to the corporate form than does the strict common law alter ego doctrine," *id.* at 26-27.

exercised significant control over the affairs of Dixie,[2] some of Dixie's employees handled the company's payroll and petty cash accounts and the management of motorcycle parts sales.

The excerpts from Dixie's corporate notebook included in the joint appendix shows that the corporation held annual meetings of its board of directors and of its shareholders in every year from 1985 to 1999 and several special meetings in 1995.[3] Denune served as director through 1989. He did not commingle personal and corporate funds, and the corporation was sufficiently capitalized at the times Dixie engaged in the illegal actions that created its liability under CERCLA.[4] At the time the case was tried in the district court, Dixie had a negative net worth of between $2,000 and $2,500.

While Denune did not control every aspect of Dixie's affairs or every transaction, he clearly controlled the particular transactions that constituted the CERCLA violations for which Dixie was found liable. The invoice for the ten transformers was sent to Dixie to the attention of Denune. Denune wrote the check on Dixie's account in payment for the transformers.

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[2] He alone determined the sales price of machines, purchased machines, and initiated all orders.

[3] The joint appendix omits minutes of the meetings held in 1998, but it appears from the minutes of the meetings held in 1999 that meetings were held in 1998.

[4] Carter-Jones does raise for our consideration the suspicious sale of Dixie's inventory to Dixie Distributing Company, Inc., a Florida corporation of which Denune is also the sole shareholder. But the sale of assets took place in 1989. Carter-Jones does not appear to question that Dixie was sufficiently capitalized in 1985, when Dixie bought the PCB-laden transformers, or in 1988, by which time the EPA had discovered the leaking transformers.

Denune signed an affidavit indicating he had been advised that the transformers contained PCBs. According to Woody Underwood, who was affiliated with Top Dollar Liquidators, the entity to which Denune sold the transformers, Denune was personally involved in the scheme with James Henderson to hide the transformers from the EPA. He was present for some period of time on the night Henderson and Underwood illegally transported the transformers to a property on Marion Road and later to a property on Herndon Road. Denune misled the Ohio EPA inspector, Thomas Buchan, concerning the number of transformers containing PCBs he or Dixie owned. Denune personally checked on the trailers containing the PCB-laden transformers at least twice. He sold to Tracy Westfall three of the seven transformers he had already sold to Top Dollar. According to Westfall, Denune personally arranged for the transportation of four transformers from the Herndon Road property to a property in Columbus owned by Denune and leased by Westfall. When the Ohio EPA finally found those transformers, the serial numbers had been destroyed.

In their briefs, Dixie and Denune have identified no person affiliated with Dixie other than Denune who had anything to do with the PCB-filled transformers.[5]

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[5] Denune's attorney and Chester Tracy, apparently a Dixie employee, accompanied Buchan on his inspection of the corporation's property in Springfield. But their involvement was incidental and in any case after the fact. There is no indication that they took part in any of Denune's illegal activities. Denune argues in his brief that Dixie employees were involved in the transportation of the transformers from Columbus to Springfield, but at trial, Denune was unable to identify any such employees.

2. Discussion

The leading Ohio case on veil-piercing is *Belvedere Condominium Unit Owners' Assn v. R. E. Roark Cos., Inc.*, 67 Ohio St.3d 274, 617 N.E.2d 1075 (1993). In *Belvedere*, the Ohio Supreme Court announced a three-pronged test to determine if a shareholder is liable for the wrongdoing of the corporation of which he is an owner. The three prongs are:

- control over the corporation by those to be held liable was so complete that the corporation had no separate mind, will, or existence of its own;
- control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity; and
- injury or unjust loss resulted to the plaintiff from such control and wrong.

Belvedere, 67 Ohio St.3d at 289, 617 N.E.2d at 1086.

In this case, there is no real argument about the second and third prongs. There is no dispute that Carter-Jones was harmed by Dixie's violation of CERCLA, or that Denune used his control over the corporation to cause it to violate the law. Denune focuses his attack on the first prong. He claims the district court erred by regarding control of the illegal transaction as sufficient, rather than analyzing the question of control using the factors set out in *LeRoux's Billyle Supper Club v. Ma*, 77 Ohio App.3d 417, 602 N.E.2d 685 (1991). He also claims the result the district court reached is contrary to the rule of *Bestfoods, supra,* because it imposes veil-piercing liability on Denune in the same circumstances in which the Court in *Bestfoods* held liability under CERCLA could not be imposed.

We review these questions of law *de novo*. *See Women's Med Profl Corp. v. Voinovich*, 130 F.3d 187, 192 (6th Cir. 1997).

A. Sufficiency of Control To Prove The First Belvedere Element

According to Denune, Ohio law requires courts to use a multi-factor test to determine whether a corporation is the alter ego of its shareholder. The factors he points to are: (1) undercapitalization; (2) failure to observe corporate formalities; (3) insolvency of the corporation at the time it incurs liability; (4) whether the shareholder held himself out as personally liable for the corporation's debts; (5) whether the shareholder diverted corporate funds to his own use; (6) failure to keep corporate records; and (7) whether "the corporation was a mere facade for the operations of the dominant shareholder." *See LeRoux's Billyle Supper Club v. Ma*, 77 Ohio App.3d 417, 422-23, 602 N.E.2d 685, 689 (1991). Here, however, he claims the district court considered only the extent of Denune's control of the illegal transaction at issue in the underlying lawsuit.

The decision in *Belvedere* came down two years after the decision in *LeRoux's Billyle*. Even after *Belvedere*, Ohio courts have continued to use a multi-factor approach when deciding whether to pierce the corporate veil. *See, e.g., Tandem Staffing v. ABC Automation Packing, Inc.*, No. 19774, 2000 Ohio App. LEXIS 2366, at *13-14 (Jun. 7, 2000); *Willoway Nurseries v. Curdes*, No. 98CA007109, 1999 Ohio App. LEXIS 4819, at * 10-11 (Oct. 13, 1999); *Barents Navigation, Ltd v. Western Overseas, Inc.*, 41 U.C.C. Rep. Serv.2d (CBC) 426. But because of the equitable nature of the veil-piercing doctrine, no list of factors can be exclusive or exhaustive. In *AT&T Global Info. Solutions Co. v. Union Tank Car Co.*, 29 F. Supp. 2d 857 (S.D. Ohio 1998), a CERCLA case involving a veil-piercing analysis under Ohio law, the court held:

> As noted in *LeRoux's*, the Ohio Supreme Court endorses the notion that the corporate veil could be pierced if an injustice would result. Several Ohio appellate courts have been even more expansive and chose to disregarded [sic] the corporate entity all together [sic] where evidence of harm, injustice, or fundamental unfairness has been found.

Id. at 868 (citations omitted). The court also noted that "Congress enacted CERCLA with the intent of ensuring that those responsible for any damage, environmental harm, or injury from chemical poisons bear the costs of their actions. Courts applying state veil piercing law in conjunction with a CERCLA action must keep this statute's broad legislative purpose in mind." *Id.* (citations and internal quotation marks omitted).

Denune's argument, if we adopted it, would straightjacket the courts in situations where equity demands that the fiction of corporate personhood be ignored. Consider, for example, a case in which a corporation with a single shareholder kept immaculate corporate records, observed all the formalities required by corporate law, and was adequately capitalized. The shareholder never commingled funds, and never held himself out as personally liable for the corporation's debts. The corporation even does some legitimate business. Can it be that the shareholder is immunized from personal liability if he causes the corporation to commit an illegal act, no matter the degree of his control over the corporation with regard to the illegal act, no matter the harm to third parties, and no matter the other equities? Neither we nor the Ohio courts hold that such immunity exists.

Clearly, the policy underlying Ohio law on veil-piercing—that the veil should be pierced "if an injustice would [otherwise] result," *AT&T Global Info. Solutions Co., supra* at

868—suggests that a wrongdoer should not be permitted to hide behind a legal fiction. Carter-Jones has also cited cases in which Ohio courts have implemented this policy by piercing the veil based solely on the degree of control exercised by the wrongdoer over the corporation. In *Janos v. Murduck*, 109 Ohio App.3d 583, 672 N.E.2d 1021 (1996), Janos contracted with Murduck, the owner of a construction company, to purchase windows. Janos paid nearly $4,000 to Murduck but never received the windows. Murduck's company declared bankruptcy. Janos sued Murduck and the company. The court found the first prong of *Belvedere* was satisfied because Murduck "ultimately approved the contract with the Janoses because he took their check, indicated an order date, and requested payment in full. We believe," the court continued,

> the state of this evidence demonstrates that Murduck exercised a degree of control over [the corporation] to render it indistinct as a corporate entity. Murduck was the owner, top executive, approved the transaction, and had the authority to represent to the Janoses that an order for the windows would occur.

Id. at 589, 672 N.E.2d at 1025. The *Janos* court pierced the veil based solely on the amount of control Murduck had over the corporation. See John H. Matheson & Raymond B. Eby, *The Doctrine of Piercing the Veil In An Era of Multiple Limited Liability Entities*, 75 Wash. L. Rev. 147, 179 nn. 142-149 (2000). *Janos* is distinguishable insofar as there, Murduck may not have disclosed his business's corporate status to Janos, whereas there is no evidence Denune sought to conceal Dixie's corporate status. But the distinction is irrelevant for our purposes, since it goes to the second prong of *Belvedere*—whether Murduck used his control of the corporation to deceive Janos—rather than to the first prong, which concerns the extent of his control.

It is important to note that in *Janos* the court focused on control of the single transaction at issue in the case. It was Murduck's control and approval of the window sale that motivated the court's ruling. *Janos* is thus a stronger case for Carter-Jones's position than either *Wiencek v. Atcole Co., Inc.*, 109 Ohio App.3d 240, 244, 671 N.E.2d 1339, 1342 (1996), or *Sintel, Inc. v. Budget Sys.*, No. 74249, 1999 Ohio App. LEXIS 2774, at *23-24 (Jun. 17, 1999), two other cases cited to us for the proposition that mere control of a corporation may be sufficient to satisfy the first prong of *Belvedere*.[6]

For the foregoing reasons, the Court rejects Denune's argument that under Ohio law, mere control of a corporation, no matter how complete, is insufficient as a matter of law to trigger veil-piercing.

B. Bestfoods

Denune argues that imposition of personal liability upon him would be contrary to the holding of *Bestfoods, supra.* According to Denune, *Bestfoods* drew a distinction between direct and derivative liability that would be lost if mere control of a corporation were enough to satisfy the first prong of *Belvedere.*

In Bestfoods, a unanimous Court held that mere control of a corporation was not enough to impose *direct* CERCLA liability

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[6] *Sintel* also contains some indication that control of the particular transaction at issue, rather than control of the corporation more generally, is important to the Ohio courts. The case concerned the purchase of unpainted binder bins by Budget Systems, a corporation owned by Liss. The court, discussing Liss's control of the corporation, noted: "For example, Liss testified that had he not given his approval, the unpainted binder bins would never have been ordered." *Id.*

on the shareholder, but that *derivative* liability could exist if the corporate veil could be pierced. *See Bestfoods,* 524 U.S. at 55. Denune argues that the district court here wrongly focused its attention on the relationship between him and the act of wrongdoing rather than on the relationship between him and Dixie. In other words, he argues that the court wrongly applied the test for direct liability to determine whether indirect liability existed.

This argument misses the point of *Bestfoods.* The Supreme Court makes it clear that courts should continue to look to the common law to determine whether to hold a corporate shareholder personally liable for the acts of the corporation in the CERCLA context. *See Bestfoods,* 524 U.S. at 63-64. The fact that Ohio common law, in this case, allows veil piercing under roughly the same conditions that CERCLA imposes direct liability is a coincidental fact about Ohio law. Denune's argument would have more force if federal common law governed the veil-piercing question, for then it would be necessary to harmonize federal common law with the statutory scheme. But as stated in note 1, *supra,* we remanded this case on the understanding that state, not federal, common law governed the veil piercing question. *See Carter-Jones Lumber,* 166 F.3d at 847. Therefore, we reject Denune's argument that insofar as Ohio's common law imposes liability on him because of his control of the corporation, the application of Ohio common law to him violates *Bestfoods.*

C. New Evidence on Remand

Finally, Denune argues that the district court erred by allowing Carter-Jones to introduce evidence of veil-piercing on remand when it had not done so at trial. We find no error.

Bestfoods was decided in June, 1998, after the first trial in the district court. We remanded for consideration of the veil-

piercing question in light of *Bestfoods*, noting explicitly that the district court had not considered it in the earlier proceeding. *See Carter-Jones Lumber*, 166 F.3d at 847-48. On remand, the decision whether to hear new evidence is within the discretion of the trial court. *Brunet v. City of Columbus*, 58 F.3d 251, 257 (6th Cir. 1995) *quoting Yashon v. Gregory*, 737 F.2d 547, 556 (6th Cir. 1984). Our "failure to specify that further evidence should be taken on remand could, at most, be construed as leaving a decision on the need to reopen the record to the sound discretion of the trial court." *Skehan v. Board of Trs.*, 590 F.2d 470, 478 (3d Cir. 1978). We find no abuse of discretion.

3. Conclusion

For the foregoing reasons, the decision of the district court is affirmed. Denune's motion to certify a question to the Ohio Supreme Court is denied.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C2-92-1161

Judge Sargus

Magistrate Judge Kemp

CARTER JONES LUMBER COMPANY,

Plaintiff,

v.

LTV STEEL COMPANY, ET AL.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case involved the contamination of land by hazardous substances in which a private-party plaintiff brought suit for contribution under CERCLA § 113, as amended, 42 U.S.C. §9613(f). After completing a two-phase trial to the bench on the issues of CERCLA liability and damages, the Court found that plaintiff Carter Jones Lumber Company ("Carter") suffered net response costs in the amount of $2,771,863.72. The Court entered judgment on March 31, 1997 in favor of Carter against defendants Harry C. Denune ("Denune") and Dixie Distributing Company ("Dixie"). In its Findings of Fact and Conclusions of Law, the Court found Dixie and its president, Harry Denune, severally liable for damages under CERCLA. Dixie was held

to be liable for 50% of plaintiff's response costs and Denune was found to be liable for 30% of such costs. Plaintiff Carter, the Court found, was responsible for 20% of the total response costs.

This matter comes before the Court on remand from the Court of Appeals for the Sixth Circuit. See *Carter-Jones Lumber Company v. Dixie Distributing Company*, 166 F.3d 840 (6th Cir. 1999). After the Opinion and Order was issued by this Court, and prior to the decision of the Court the Appeals, the Supreme Court issued an opinion in *United States v. Bestfoods*, 118 S. Ct. 1876 (1998), which clarified the law as to how the corporate veil may be pierced and liability assessed to another corporation or individual. The sole issue on remand is whether the plaintiff may pierce the corporate veil to impose personal liability upon defendant Harry Denune for the judgment against defendant Dixie Distributing Company for its share of the response costs incurred by plaintiff Carter-Jones Lumber for the clean-up of the contaminated land.

On April 26, 1999, the Court conducted an evidentiary hearing during which the parties presented evidence related to this narrow issue on remand. For the reasons stated below, the Court finds that, under Ohio law and the facts of this case, the corporate veil of Dixie Distributing Company will be pierced to reach defendant Harry Denune as the sole shareholder, thereby making him jointly and severally liable for Dixie's share of the net response costs as previously determined by this Court.

FINDINGS OF FACT

The Court, hereby, incorporates by reference the relevant findings of this Court as found in its Findings of Facts and Conclusions of Law Order of March 31, 1997. In that Order the Court found that Harry Denune, on behalf of Dixie Distributing Company, purchased ten (10) transformers, each of which

contained quantities of polychlorinated biphenyls ("PCBs"), a hazardous substance. Mr. Denune purchased the transformers using corporate purchase order checks and signed as president of the corporation. (Trial Tr., at 101)[1] Ultimately, four of the transformers leaked PCB contaminants into the soil of land owned by Plaintiff Carter-Jones. The Court found that Dixie and its president Harry Denune deliberately arranged for the unlawful disposal of PCB transformers which contained the materials resulting in cleanup costs to plaintiff Carter-Lumber. Liability under CERCLA was imposed on both Harry Denune and Dixie.

Dixie Distributing Company began in 1963 as a motorcycle parts distribution company, formally known as Chain Corporation of America, selling chains and sprockets. (Trial Tr., at 29, 81; Def's Ex. B.) To supplement the motorcycle parts sales, Denune began purchasing at liquidation auctions machinery and supplies for resale. (Trial Tr., at 84-85) Harry Denune is currently and always has been the sole shareholder of Dixie Distributing Company since it was incorporated under Ohio law in 1963. (Trial Tr., at 29) Initially, Dixie's inventory receiving and bulk storage operated out of a facility in Springfield, Ohio with the sales of items made out of the Columbus, Ohio facility. (Trial Tr., at 86) Robert Bloom was the manager of the Columbus operation. *Id.* By the end of May, 1989, Dixie began shipping out of Springfield as well as Columbus.

Denune was president of Dixie until the end of May, 1989 when Marc Reed assumed that title. (Trial Tr., at 45) Denune determined the price of the machinery to be sold, he purchased

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[1] References to the Proceedings on Remand conducted on April 26, 1999 are designated as "Trial Tr., at __."

machinery at auction, and he initiated all the orders for Dixie. (Trial Tr., at 13) Denune maintained total control over the monetary transactions of Dixie. (Trial Tr., at 16) The hiring decisions for the Columbus and Springfield facilities were made by Bob Bloom and Marc Reed respectively. (Trial Tr., at 87)

In early 1989, Denune started a new company, Dixie Distributing Company, Inc., a 1989 Florida corporation (hereinafter "Dixie Florida"). (Trial Tr., at 32-33) Denune owned all of the stock in Dixie Florida and was the only member of the Board of Directors. (Trial Tr., at 33-34, 39) On February 17, 1989, Dixie sold its inventory to Dixie Florida for a $60,000 premium. (Trial Tr., at 47, 113; Def's Ex. F) As part of inventory sale, Dixie Florida received all of Dixie's customer lists, customers and employees (Trial Tr., at 116) Thereafter, to fill orders, Dixie had inventory shipped from Florida as needed for sales. (Trial Tr., at 50)

According to Mr. Denune, the accounting functions of Dixie were handled by Cliff Thompson, Don Shaw, and Audrey Bullard. Ms. Bullard, who is now married to Mr. Denune, took over the accounting functions sometime in 1990. (Trial Tr., at 87) During 1985 through 1990, Margaret Denune managed Dixie's payroll, assisted by Cliff Thompson who was also an employee of Dixie International. (Trial Tr., at 88) The evidence presented at the hearing on remand shows that Dixie filed its corporate tax returns every year it was in existence. (Trial Tr., at 89; Def's Ex. F) According to Harry Denune, Dixie had an independent bank account, including a general account, payroll, and transportation account (Trial Tr., at 98); Dixie paid all of its debts, always had assets (Trial Tr., at 95), and never commingled funds with Mr. Denune's personal assets. (Trial Tr., at 96) Audry Bullard, a certified public accountant with over twenty years experience, has served as Dixie's controller since 1995. (Trial Tr., at 106, 109) Before

that, she reviewed Dixie's tax returns. (Trial Tr., at 109) Ms. Bullard testified that Dixie has not been liquid since the garnishment proceedings related to this case initiated in 1997. Dixie is now insolvent with a negative net of between $2,000 and $2,500 (Trial Tr., at 109-10, 116)

Reviewing the financial history of Dixie, the Court notes the following: Dixie experienced a profit of $106,000 in 1987, a $62,000 profit in 1988, and a $35,000 profit in 1989. (Trial Tr., at 102; Ex. F) In 1990, Dixie's books show a loss of $290,058 in 1990, as well as losses of $247,613 in 1991, $249,061 in 1992, and $898, 343 for 1993.

CONCLUSIONS OF LAW

The Court of Appeals for the Sixth Circuit instructs that application of the law of Ohio corporations to CERCLA liability may resolve the issue of whether the liability of the defendants in the instant case should be several or joint and several. *Carter-Jones Lumber Co. v. Dixie Distributing Co.*, 166 F.3d 840, 847 (6th Cir. 1999). In its opinion and order to remand, the Sixth Circuit directed that an analysis of piercing the corporate veil under Ohio law may resolve the issue of whether Harry Denune may be jointly and severally liable for the CERCLA response costs allocated to Dixie Distributing by the Court in its original judgment order. *Id.* at 847-48. As a point of reference and direction, the Sixth Circuit cited the case of *United States v. Bestfoods*, 118 S. Ct. 1876 (1998) in which the United States Supreme Court applied state law to pierce the corporate veil in CERCLA cases.

In *United States v. Bestfoods*, the Supreme Court explained that the application of Ohio law is appropriate in resolving liability issues relating to corporations and officers when it applied the state law for piercing the corporate veil in CERCLA cases. *Id.* at 1885. Although unrelated defendants are to be

made severally liable in an action for contribution under CERCLA, the statute's "regulation of an environmental tort should not and does not relieve a corporation, its officers, or its owners of their bargained-for duties and liabilities as they do business in the corporate form." *Carter-Jones Lumber*, 166 F.3d at 847. Further, the section governing contribution actions under CERCLA does not address issues of corporate liability. Therefore, section 113(f) should not be presumed to alter state laws governing liability of corporations vis a vis their officers and owners. *Id.*

The Sixth Circuit's order of remand provides the framework within a Section 113(f) contribution action wherein joint and several liability may be imposed; it does not change the underlying law upon which plaintiff's claim is premised. As directed by the Sixth Circuit, the Ohio Supreme Court decision in *Belvedere Condominium Unit Owners' Ass'n v. R.E. Roark Cos., Inc.*, 67 Ohio St. 3d 274 (1993), sets forth the standard, under Ohio law, for the determination of whether the corporate veil may be pierced. See *Carter-Jones-Lumber*, 166 F.3d at 847. The standard established by the *Belvedere* court permits the corporate form to be disregarded and individual shareholders to be held liable for corporate misdeeds under Ohio law when:

> (1) control over the corporation by those held liable was so complete that the corporation has no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong.

Belvedere Condominium Unit Owners' Ass'n v. R.E. Roark Cos., Inc., 67 Ohio St.3d 274, 289 (1993). See also *Bucyrus-*

Erie Co. v. General Prod. Corp., 643 F.2d 413, 418 (6th Cir. 1981). If these requirements are met, the corporate veil will be pierced and Mr. Denune will be held liable for the wrongs of Dixie. The veil of the corporation "can be pierced and individual shareholders held liable for corporate misdeeds when it would be unjust to allow the shareholders to hide behind the fiction of the corporate entity." *Belvedere*, 67 Ohio St.3d at 287.

A. Control Over Dixie So Complete that Dixie Had No Separate Mind, Will, or Existence of Its Own.

The first prong enunciated in *Belvedere* requires sufficient evidence of Mr. Denune's domination and control over Dixie to prove that Dixie had "no separate mind, will, or existence of its own." See *id.* at 288. Harry Denune is currently and always has been the sole shareholder of Dixie since it was originally incorporated under Ohio law in 1963. (Def's Trial Brief, at 4) There is no dispute that Denune possessed ultimate authority and control over the operations and direction of Dixie. The Court notes, however, that "mere control over a corporation is not in itself a sufficient basis for shareholder liability." *Belvedere*, 67 Ohio St.3d at 289.

An individual shareholder may be held liable "only if the shareholder is indistinguishable from or the alter ego of the corporation itself." *Id.* at 287. There is no dispute that Harry Denune had complete ownership over Dixie. This, in the Court's mind, creates the potential for control over matters in the corporation and conduct of the corporation. Mr. Denune used that control to make Dixie perform specific acts. Denune controlled and directed the purchase, the transportation and the unlawful concealment of the transformers. Denune's dominant control overcame the corporate will of Dixie and resulted in the spill of hazardous waste that contaminated plaintiff's land.

Further, in October, 1988, Thomas Buchan, an inspector the Ohio EPA, met with Mr. Denune and his attorney relating, to PCV inspection related to transformers (Trial Tr., at 6) Mr. Buchan only met with Mr. Denune and other representative from Dixie. Denune and Buchan personally inspected the Springfield facility. (Trial Tr., at 7) To Mr. Buchan's knowledge, no one else other than Mr. Denune could answer questions related to Dixie. (Trial Tr., at 8)

The February 1989 sale of inventory from Dixie to Dixie Florida also indicates a great degree of control on the part of Harry Denune. He directed the losses of Dixie's assets through the sale of all the inventory and established Dixie Florida as a sub S corporation. In May, 1989, Harry Denune turned over the presidency of Dixie to Marc Reed. Such conduct could only be performed at the direction of Harry Denune as the sole shareholder of Dixie. This conduct can be seen as a conveyance of Dixie's assets to avoid paying the judgment in this matter. In 1990, Dixie's financial books showed a loss of $290,058, while in the same year Dixie Florida attained a profit of $543,000. Plaintiff contends that the expenses for attorneys and EPA inspections account for Dixie's lost profits in 1989.

For the purposes of piercing the corporate veil, inadequate capitalization is defined as capitalization that is very small in relation to the nature of the business of the corporation and the risks the business necessarily entails. *AT&T Global Information Solutions v. Union Tank, Car Co.*, 29 F. Supp.2d 857, 867 (S.D. Ohio) (citations omitted). Dixie had environmental risks of which Harry Denune was intimately aware. Leaving no assets in place to provide for potential liability is equivalent to undercapitalization. *Id.*

In light of the testimony presented at the remand proceedings together with testimony presented in the prior hearings of this

case, the Court finds that the conduct attributable to the defendant corporation Dixie was, to a great extent, the conduct of defendant Harry Denune. Given the foregoing, the Court finds that there is sufficient evidence to conclude that Harry Denune had the requisite control to pass the first prong of the *Belvedere* test.

B. Control Exercised in Manner to Commit Fraud or an Illegal Act Against Person Seeking To Disregard the Corporate Entity.

The second prong of the *Belvedere* test for piercing the corporate veil requires proof that an individual's control over a corporation was exercised so as to commit fraud or an illegal act against the person seeking to disregard the corporate entity. Ohio courts construing *Belvedere* have held that the corporate veil may be pierced to prevent inequitable or unfair consequences. *See, e.g., Wiencek v. Atcole Co., Inc.* 109 Ohio App.3d 240, 244 (1996). Even prior to *Belvedere*, Ohio courts had reached this same conclusion. *LeRoux's Billyle Supper Club v. Ma*, 77 Ohio App.3d 417 (1991). Several Ohio appellate courts have been even more expansive in finding that the corporate form may be disregarded where evidence of harm, injustice, or fundamental unfairness has been found. *Id*; *see generally Dirking v. Blue Chip Architectural Prod., Inc.*, 100 Ohio App.3d 213 (1994); *Link v. Leadworks Corp.*, 79 Ohio App.3d 735 (1992); *Central Benefits Mut. Ins., Co. v. RIS Admrs. Agency Inc.*, 93 Ohio App.3d 397 (1994). Thus, under Ohio law, if injustice can be shown, prong two of *Belvedere* will be satisfied. *AT&T Global Information Systems*, 29 F. Supp.2d at 868.

In the instant case, the record reflects that Denune was well aware of that the transformers contained PCBs and that PCBs are a hazardous substance. Denune knew the potential

liabilities associated with dealing in transformers, yet negligently transported them and failed to properly secure them in storage. Since the corporate fiction is capable of abuse by dominant shareholders, Ohio courts have permitted piercing of the corporate veil under egregious circumstances. *Belvedere*, 67 Ohio St.3d at 288.

Based on these facts, the Court finds that Carter was harmed by the actions of both Harry Denune and Dixie. It would be fundamentally unfair for Dixie to evade its obligation of reimbursing Carter for the response costs paid to clean up land contaminated by hazardous PCB's leaked onto Carter's property due to the misconduct of Denune. Further, the goals and policies of CERCLA would be defeated if the actual party, Denune, who profited from improper disposal was able to escape liability. Thus, considering the intent behind CERCLA and the cases construing *Belvedere*, the record in this case presents sufficient evidence to pass the second prong, or the fairness element, of the *Belvedere* test for piercing the corporate veil.

C. Injury or Unjust Loss Resulted to Plaintiff From Such Control.

In its previous opinions in this case, the Court has found that Dixie's actions resulted in the illegal disposal of hazardous waste on plaintiff's land causing plaintiff to incur response costs of over two million dollars. The costs of Dixie's actions should rightly be born by the party who controlled it, not plaintiff Carter-Lumber. The, the Court finds sufficient evidence to determine that plaintiffs have met the third prong of *Belvedere*.

Given that the three *Belvedere* requirements are met, the corporate veil of Dixie Distributing Inc. will be pierced to ensure that the entity -who ultimately profited from arranging

for the improper disposal of hazardous waste bears sufficient burden for its cleanup. Such a finding is consistent with the expansive remedial purposes of CERCLA.

Harry Denune, then, is derivatively liable for the actions of Dixie in arranging for the disposal of hazardous wastes at plaintiffs property. Sufficient control and resulting wrongful conduct has been demonstrated to satisfy *Belvedere*. Consequently, Harry Denune is liable to Carter for what has been determined to be his share and Dixie's share for the cleanup costs.

Therefore, the Court determines that, under Ohio law, the corporate veil will be pierced to reach Denune as the sole shareholder. Harry Denune, therefore, shall be held jointly and severally liable for Dixie's share of the allocated response costs for CERCLA liability. See *Belvedere*, 67 Ohio St.3d 274 (1993). Accordingly, Harry Denune is responsible, along with Dixie Distributing Company for 50% of the net response costs previously determined by this Court under Section 113(f) of CERCLA in its two orders rendering judgment in this matter. See Findings of Fact and Conclusions of Law Order dated March 31,1997; and Order Nunc Pro Tunc dated April 4, 1997. Harry Denune remains responsible for 30% of the net response costs as previously determined by this Court.

The Court **HEREBY ORDERS**:

1. The Court previously determined the net cost of the cleanup site located at 4975 Hendron Road, Groveport, Ohio to be $2,771,863.72. See Findings of Fact and Conclusions of Law Order, dated March 31, 1997 at 29.

2. Having previously found Dixie and Denune liable for the contamination of the site located at 4975 Hendron Road, Groveport, Ohio, the court directs the Clerk to enter final

judgment declaring that defendants Harry Denune and Dixie Distributing company are jointly and severally liable for 50% of the net response costs. The amount of $1,385,931.86 shall be paid to plaintiff Carter-Jones Lumber in contribution for costs already incurred. Both Harry Denune and Dixie Distributing are jointly and severally liable for such amount.

3. Having previously found Denune liable for the contamination of the site located at 4975 Hendron Road, Groveport, Ohio, the Court directs the Clerk to enter final judgment declaring that defendant Harry Denune is responsible for 30% of the net response costs. The amount of $831,559.12 shall be paid to plaintiff Carter-Jones Lumber in contribution for costs already incurred. Harry Denune is individually liable for such amount.

IT IS SO ORDERED.

/s

EDMUND A. SARGUS, JR.

United States District Judge

9-24-99

Date

APPENDIX C

**UNITED STATES COURT OF APPEALS,
SIXTH CIRCUIT.**

CARTER-JONES LUMBER COMPANY,

Plaintiff-Appellee/Cross-Appellant,

v.

**DIXIE DISTRIBUTING COMPANY
AND HARRY C. DENUNE,**

Defendants-Appellants/Cross-Appellees,

LTV STEEL COMPANY, ET AL.,

Defendants.

Nos. 97-3422, 97-3709.

**Argued Oct. 30, 1998.
Decided Feb. 2, 1999.**

Before: BOGGS, SUHRHEINRICH, and SILER, Circuit Judges.

OPINION

SILER, Circuit Judge.

The district court found defendants, Dixie Distributing and Harry C. Denune, Dixie's 100% shareholder, severally liable under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), as amended, 42 U.S.C. § 9601 *et seq.*, as arrangers for the disposal

of hazardous waste. That waste had contaminated land owned by plaintiff, Carter-Jones Lumber Co., which filed this CERCLA action against Dixie, Denune and other defendants, not parties to this appeal, to recover costs expended in cleanup of the site. Dixie and Denune appealed the judgment. Carter-Jones cross-appealed the decision of the court denying joint and several liability by Dixie and Denune. We AFFIRM in part and REVERSE in part.

I. BACKGROUND:

Carter-Jones initiated this private cost-recovery action against Dixie (an Ohio corporation) and Denune pursuant to § 113 of CERCLA, which governs contribution actions. Carter-Jones sought reimbursement for costs it incurred in removing environmentally hazardous substances from a site in central Ohio.

After trial, the district court found Dixie to be liable for 50% of the response costs, with Denune liable for 30% of the response costs, recoverable by Carter-Jones as a claim for contribution under 42 U.S.C. § 9613(f). The district court initially found them to be jointly and severally liable, but upon petition for reconsideration, it amended its order to make them severally liable only.

In October 1985, Dixie and Denune purchased from Federal Paper Board Company ten transformers containing polychlorinated biphenyls ("PCBs") and six regulators for a total price of $1,000.00. Denune signed an affidavit at the time of sale acknowledging the problem with PCB disposal and apparently negotiated the purchase of the transformers. At the time of purchase, Dixie obtained a report from Federal Paper of a recent inspection of the transformers which indicated that they were not leaking. The transformers were later moved to real estate owned by Denune. Three were sold to an individual

named Abe Hoosharnejad in Columbus and were later destroyed by fire, according to the testimony of Denune, while the remaining seven transformers were moved to a building in Springfield, Ohio in the spring of 1986.

In June 1987, Dixie sold the seven transformers to Top Dollar Liquidators for $700.00. James Henderson signed (or seems to have signed, although there is conflicting evidence on this point) an affidavit on behalf of Top Dollar acknowledging the problem of PCB disposal. Only four of those transformers were moved by Top Dollar to a facility in Columbus. They were moved without a permit in an overweight truck illegally at night so as to be undetected by the authorities. Woody Underwood, affiliated with Top Dollar, was present when the transformers were sold to Top Dollar and stated that Henderson and Denune were entering into an arrangement to hide the transformers from the Ohio Environmental Protection Agency ("OEPA").

In September 1987, Denune sold to Tracy Westfall three of the seven transformers which he had already sold to Top Dollar and James Henderson. Denune alleges that Westfall signed an affidavit acknowledging the problem of PCB disposal, but Westfall denied even signing the affidavit. Both Henderson and Westfall were in the salvage liquidation business. According to Henderson, the trailer containing Top Dollar's four transformers remained locked and stationary at the Hendron Road property, the property involved in the cleanup here, for approximately one year.

In July 1988, Stephen Rumich notified the OEPA in a citizen complaint that transformers were being destroyed, or "scrapped," according to employees at the Hendron Road property, and that oil was leaking onto the ground. The next day, Tom Buchan of the OEPA inspected the site and discovered that four PCB-containing transformers were on the

premises in a trailer. Their serial numbers were intact. He discovered that two of the four showed evidence of leakage, although there was no active flow, and that there was extensive leakage of oil on the ground. One transformer was damaged by something other than deterioration, and Henderson told Buchan that the spill was caused by an employee who opened a valve on a transformer. Buchan also testified that additional drums contaminated with PCBs were on the trailer.

Buchan traced the four transformers to Federal Paper, which informed him that, in 1985, it sold ten transformers to Denune and Dixie. Then, in October 1988, Buchan inspected Dixie's Columbus facility and arranged to inspect the Springfield facility in November. Two hours before the inspection at Springfield in 1988, a truck left that property and drove to a location in Butler County known as Canal Auto. The truck was found to contain five PCB transformers with the tops removed, as well as other contaminated items such as paint solvents and PCB-laden capacitors. Denune had previously told Buchan that he only had two PCB transformers. A cleanup then began at the Canal Auto site and was paid for by Dixie and Denune.

After that cleanup, the OEPA attempted to have the Hendron Road site cleaned through contacts with Henderson, Michael Walcutt, and Dean Walcutt, who had negotiated an option to purchase the property from Carter-Jones. A contingency to the purchase was Walcutt's cleanup of the property. In May 1989, Dean Walcutt decided not to exercise the option on the property, but he did not notify Carter-Jones. While the transformers were at the Hendron Road property, Denune personally checked on them on at least two occasions. Also in May 1989, the trailer containing the four transformers was taken from the Hendron Road property on a day when both Henderson and Westfall were on the premises. The four transformers were later found on property in Columbus which

was owned by Denune and leased by Westfall. Westfall testified that Denune arranged for the delivery of the transformers to that property. When the transformers were found in Columbus, the identifying serial numbers had been removed and they were in various stages of destruction. That same month the OEPA arrived at the Columbus site, and Defendant Denune was ordered to clean up the site.

In July 1990, Carter-Jones entered into a Consent Order to clean up at the Hendron Road property, and it ultimately incurred cleanup costs of over $3 million.

At all times relevant to the liability issues in this case, Denune was president, chief executive officer, and the only shareholder of Dixie. He ceased to be president and CEO in 1989, but remains the sole owner of Dixie. He denies that he was involved in Dixie's illegal disposal practices, arguing that he was but one of twenty-one employees of Dixie. He has not, however, presented any evidence to show that any other Dixie employee had responsibility for waste disposal practices. Denune is the representative of Dixie who purchased and sold the transformers and who signed the affidavit relating to PCB hazards on Dixie's behalf at the time the transformers were first purchased.

II. DISCUSSION:

A. Arranging for the disposal of hazardous substances.

Under CERCLA, any person who has "otherwise arranged for disposal" of hazardous substances is liable for response costs. 42 U.S.C. § 9607(a)(3). The requisite inquiry for those who may have "otherwise arranged" is "whether the party intended to enter into a transaction that included an 'arrangement for' disposal of hazardous substances. The intent need not be proven by direct evidence, but can be inferred from the totality

of the circumstances." *United States v. Cello-Foil Prods., Inc.*, 100 F.3d 1227, 1231 (6th Cir. 1996).

> "Frequently, the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds." Whether a party possesses the requisite intent is a question of fact.

Id. at 1233 (citations omitted) (quoting *Washington v. Davis*, 426 U.S. 229, 253, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) (Stevens, J., concurring)). This court therefore reviews a district court's determination that a party "otherwise arranged for disposal" for clear error. It is true that the Sixth Circuit has apparently applied *de novo* review to a case such as this, in *United States v. Cordova Chemical Co. of Michigan*, 113 F.3d 572 (6th Cir. 1997), but as that case was vacated after review by the Supreme Court, *United States v. Bestfoods*, 524 U.S. 51, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998), we will follow the plain statement of *Cello-Foil* that intent is a question of fact.

The facts of this case are complex and the evidence is somewhat unclear. The district court's determination that defendants intended to arrange for disposal is not clearly erroneous, as evidence in the record supports that determination. The result of the many transactions was that the transformers were indeed being scrapped rather than reused. Arguably shady practices were used by defendants and those with whom they dealt. The district court's inference that defendants intended the arrangement for disposal cannot be overturned on the evidence in this case under a clearly erroneous standard.

B. Third party defense.

The third party defense under CERCLA requires proof that the acts or omissions of a third party be the sole cause of a release. 42 U.S.C. § 9607(b)(3). This third party may not be one whose act or omission is contractually connected with the defendant, either directly or indirectly. *Id.* Because the district court's factual determination that defendants "otherwise arranged for disposal" is not clearly erroneous, the third party defense is not appropriate.

Reviewed either for clear error or *de novo,* the district court's determination that the third party defense is inapplicable here is correct. Because the third party alleged to have been the sole cause of the release was the employee of Henderson, the person with whom Dixie was said to have arranged for disposal, the third party defense is unavailable. It may indeed be true that the acts of Henderson's employee were intentional and criminal, but the acts and the consequences were not unforeseeable, as required by the statutory defense, *see* 42 U.S.C. § 9607(b)(3).

C. Constitutionality of cost apportionment under 42 U.S.C. § 9613.

This question of constitutional law will be reviewed *de novo* by this court. Defendants argue that this system of cost apportionment, wherein a "court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate," 42 U.S.C. § 9613(f), affects an interest protected by the due process clause, the right not to have property taken without due process of law. Defendants argue that their right to due process is violated by § 9613(f) because it provides no definite standard by which a court is to make its determinations.

Federal courts are courts in law and in equity, and a court of equity has traditionally had the power to fashion any remedy deemed necessary and appropriate to do justice in a particular case. *United States v. Price,* 688 F.2d 204, 211 (3d Cir. 1982).

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs....

Hecht Co. v. Bowles, 321 U.S. 321, 329, 64 S.Ct. 587, 88 L.Ed. 754 (1944). The system of cost apportionment under 42 U.S.C. § 9613 is not unconstitutionally vague.

D. Denune's personal liability under 42 U.S.C. § 9607(a)(3).

If the district court placed liability on Denune because it found that he personally participated in the arrangements for disposal, that conclusion would be subject to review for clear error, as discussed previously. If the court placed liability on Denune because of his position as president, CEO, and sole shareholder, that conclusion would be a conclusion of law subject to *de novo* review. Although the district court discusses Denune's active role in the transactions related to the PCB transformers, it also appears to have relied upon Denune's position in Dixie. *De novo* review is therefore the most appropriate standard.

Under either standard of review, it is imperative that this court consider the district court's decision in light of *United States v. Bestfoods,* 524 U.S. 51, 118 S.Ct. 1876, 141 L.Ed.2d 43 (1998), a decision which vacated this court's decision in

United States v. Cordova, 113 F.3d 572 (6th Cir. 1997), and which also caused the Supreme Court to vacate the decision in *Donahey v. Bogle*, 129 F.3d 838 (6th Cir. 1997), *vacated*, 524 U.S. 924, 118 S.Ct. 2317, 141 L.Ed.2d 692 (1998). In *Bestfoods*, the Supreme Court answered the question of whether a parent corporation that participated in, and exercised control over, the operations of a subsidiary may, without more, be held liable as an operator of a polluting facility owned or operated by the subsidiary. The Court said no, unless the corporate veil is pierced. *Bestfoods*, 118 S.Ct. at 1881. However, it added that a corporate parent that actively participated in, and exercised control over, the operations of the facility itself may be held directly liable in its own right as an operator of the facility. *Id.*

Bestfoods, a case involving § 9607(a)(2), operator liability, must logically be applied to cases involving § 9607(a)(3), arranger liability: Both operators and arrangers are potentially responsible parties ("PRPs"). Here, using *Bestfoods*, Denune can be liable as an arranger for disposal due to his status as the sole shareholder of Dixie if Ohio law would allow the piercing of the corporate veil, and he can also be liable in his own right due to his intimate participation in the arrangement for disposal. He may not hide behind his officer or employee status in Dixie to claim that because he took all actions on behalf of the company he cannot be personally liable. Under Ohio law, a corporate officer can be held personally liable for a tort committed while acting within the scope of his employment. *See, e.g., Atram v. Star Tool & Die Corp.*, 64 Ohio App.3d 388, 581 N.E.2d 1110, 1113 (1989); *Bowes v. Cincinnati Riverfront Coliseum, Inc.*, 12 Ohio App.3d 12, 465 N.E.2d 904, 911 (1983). The evidence in this case supports the district court's findings of fact, and those findings satisfy the *Bestfoods* requirement that an officer be actively involved in the

arrangements for disposal before individual liability may be imposed. Denune was properly held to be individually liable.

E. Several or joint and several liability.

This court reviews *de novo* the district court's determination that although the harm caused by Dixie and Denune was indivisible, their liability must be several as a matter of law. It is not necessary, however, that we reach Carter-Jones's argument as to this court's ability to create joint and several liability in a CERCLA contribution case by using its equitable powers and the federal common law. Application of the law of Ohio corporations to CERCLA liability may well resolve the issue.

Application of Ohio law is appropriate in resolving liability issues relating to corporations and officers, as explained by the Supreme Court when it applied the state law for piercing the corporate veil in CERCLA cases. *See Bestfoods*, 118 S.Ct. at 1885.

> CERCLA is . . . like many another congressional enactment in giving no indication that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute, and the failure of the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that in order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law.

Id. (internal citations and quotations omitted). It is correct that unrelated defendants are to be made severally liable only, rather than jointly and severally liable, in an action for contribution under CERCLA. *See Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp.*, 153 F.3d 344, 356 (6th Cir. 1998). However,

CERCLA's regulation of an environmental tort should not and does not relieve a corporation, its officers, or its owners of their bargained-for duties and liabilities as they do business in the corporate form. Section 113(f) of CERCLA, the section governing contribution actions, in no way addresses issues of corporate liability,[1] and it should not therefore be presumed to alter state laws governing the liability of corporations *vis a vis* their officers and owners.

Denune is personally liable for his active role in the arrangement for disposal, and, as he makes clear, he performed the acts which resulted in the release of hazardous substances in his role as an officer of Dixie. In Ohio both a corporation and an officer are liable for wrongful acts committed by an officer in performance of his corporate duties. *See Atram*, 581 N.E.2d at 1113. Joint and several liability between Dixie and Denune for Denune's share of the response costs is therefore appropriate.

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[1] (1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section [107(a)], during or following any civil action under section [106] or under section [107(a)]. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing is this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section [106] or section [107].

42 U.S.C. § 9613(f)(1).

If the corporate veil may be pierced under Ohio law to reach Denune as the sole shareholder, then he will be jointly and severally liable for Dixie's share of the response costs. *See Belvedere Condominium Unit Owners' Ass'n v. R.E. Roark Cos., Inc.*, 67 Ohio St.3d 274, 617 N.E.2d 1075, 1085 (Ohio 1993). Under Ohio law,

> the corporate form may be disregarded and individual shareholders held liable for corporate misdeeds when (1) control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong.

Id. at 1086. The district court did not address the issue of veil piercing, and this court does not have sufficient evidence before it to make its own determination at this time.

Because the district court's application of the Ohio law of corporations to the facts of this case may well preclude the need for this court to address Carter-Jones's argument that § 113 of CERCLA itself allows for joint and several liability when equity requires, we need not and do not reach that question here. The district court's determination that Dixie and Denune's liability must be several as a matter of law is reversed, and the case is remanded to the district court for further consideration consistent with this decision.

AFFIRMED in part, REVERSED in part, and REMANDED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Case No. C2-92-1161
Judge Edmund A. Sargus, Jr.
Magistrate Judge Kemp

CARTER-JONES LUMBER COMPANY,
Plaintiff,

v.

LTV STEEL COMPANY, et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff Carter-Jones Lumber ("Carter") initiated this private cost recovery action against defendants Dixie Distributing Company, Inc. ("Dixie Distributing") and its president, Harry Denune pursuant to the Comprehensive Environmental Response, Compensation, and Liability, Act of 1980 ("CERCLA"), as amended, 42 U.S.C. § 9601 et seq. Plaintiff seeks reimbursement for costs it incurred in removing environmentally hazardous substances from a site in central Ohio. The Court has jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 9601 et seq.

The Court conducted a two-phase trial. The first phase addressed the liability issues involved in the case. Having found defendants Dixie Distributing and Harry Denune liable for CERCLA response costs under 42 U.S.C. § 9607(a)(3), the Court presided over the damages phase of the trial. After

considering the testimony, exhibits, arguments of counsel, and supporting memorandum, the Court makes the followings Findings of Fact and Conclusions of Law pursuant to Federal Rule of Civil Procedure 52(a).

FINDINGS OF FACTS

On October 29, 1985, defendant Harry Denune purchased from Federal Paper Board Company, Inc. ten (10) transformers, each of which contained quantities of polychlorinated biphenyls ("PCBs"). The transformers had been in use at a glass factory operated by Federal Paper Board Company, Inc. and were purchased and installed prior to July 1, 1979. As of July 1, 1979, federal law prohibited further manufacture and installation of new transformers containing PCBs. 15 U.S.C. § 2601 et seq. At the same time, federal law permitted the continued use of PCB transformers manufactured and installed for use prior to July 1, 1979. Further, subject to a series of administrative regulations set forth in 40 C.F.R. Part 761, federal law permits future sales of PCB-filled transformers, so long as the same were manufactured and installed prior to July 1, 1979.

Essentially, plaintiffs allege that both defendants, Dixie Distributing Company and its president Harry Denune, entered into the contract with Federal Paper Board Company, Inc. for the disposal, rather than sale, of the transformers. Ultimately, four (4) of the transformers were stored on property known as 4975 Hendron Road, Groveport, Ohio. The transformers leaked PCB contaminants into the soil. Final cleanup on the site involved cost to plaintiff of $3,880,000, a portion of which the plaintiff seeks to recover from the defendants. The plaintiff contends that defendants Dixie Distributing and Harry Denune are liable under § 107 of CERCLA.

The initial sale of the ten transformers from Federal Paper Board Company, Inc. was negotiated by Henry Denune, who was at all times relevant to this case, president of the company and sole owner and stockholder. The sale was accompanied by the issuance of an invoice to Dixie Distributing found at Plaintiff's Exhibit 1. However, an accompanying affidavit wherein the seller notifies the purchaser of the presence of PCB contaminants and that the same are subject to federal rules and regulations is signed only by Harry Denune without a designation that the document is executed on behalf of Dixie Distributing. Each of the transformers was purchased for $100 for a total purchase price of $1000.

Several months after purchase, the ten transformers were moved to real estate located at 611 Marion Road, Columbus, Ohio. While the premises were used for the operation of Dixie Distributing, the real estate was titled in the sole name of Harry Denune. Denune testified that he originally planned to use seven of the transformers in a warehouse owned by him and maintained for use by the defendant corporation. Denune made reference to a potential lease of the Teledyne building in Springfield, Ohio to Japanese investors although, as plaintiff notes, no actual potential lessees were ever identified by Denune.

In the spring of 1986, seven of the transformers were moved to Springfield in the Teledyne building. Denune testified that no manifest or other record was prepared for transportation of the PCB-laden transformers, in clear violation of both federal and state law.

In early 1986, three of the ten transformers remaining in Columbus were sold to an Abe Hjshoorniaged. Denune testified that Mr. Hjshoorniaged signed an affidavit similar to the one found in Plaintiff's Exhibit 3 and was given an invoice

accompanying the sale. Sometime thereafter, the building occupied by the business of Abe Hjshoorniaged burned to the ground. Apparently, the three transformers were destroyed in the fire.

On June 4, 1987, the seven transformers moved to Springfield were the subject of a sale agreement between Dixie Distributing and Jim Henderson, acting on behalf of Top Dollar Liquidators. While the nature of the transaction is disputed by the parties, certain preliminary matters are uncontested. There is no dispute that the original agreement to purchase involved all seven transformers moved by the defendant to Springfield, Ohio. It is also undisputed that the purchase price was $100.00 per unit, for a total of $700.00.

Many other aspects of the transaction are in sharp dispute. One of the principles of Top Dollar Liquidators at the time of the purchase was a Woody Underwood, now deceased. The deposition of Mr. Underwood was admitted into evidence, subject to the exclusion of certain testimony objected to by the defendant as hearsay. Underwood testified that the defendant, Harry Denune, stated to Henderson and Underwood that "... he needed to store them [sic] transformers some place until he could get the EPA straightened out. Jim [Henderson] said that would be no problem." According to Underwood, this statement was made at the time the transformers were picked up from Denune's Springfield location. Underwood is a convicted felon and admitted that the plaintiffs had promised not to pursue any claims against him if he would testify truthfully.

Both Denune and Henderson deny that Denune ever made such statements. Henderson's testimony is somewhat contradictory in this regard. At trial, Henderson stated that Denune and Underwood were never present on the Springfield premises at the same time. Previously, Henderson testified by

way of deposition that Denune and Underwood were both present at the same time at the Springfield facility, although no conversations took place.

Denune testified that with respect to the Henderson/Top Dollar sale, he caused an affidavit to be prepared similar to the affidavit he had signed when he purchased the ten transformers from Federal Paper Board Company, Inc. The affidavit was purportedly signed by James Henderson and verified that the transformers contained PCBs and that the same were subject to stringent environmental controls. Henderson later told an EPA inspector, Thomas Buchan, that he did not actually sign the affidavit and that a Robert Niswonger may have signed his name.[1]

Denune testified that with regard to the three sales involving the ten transformers he originally purchased, affidavits were prepared in each transaction notifying the purchaser as to the presence of PCBs and of stringent federal laws and regulations governing the same. Two of those affidavits bear signatures of purported affiants even though both purported affiants have claimed that they did not sign the same. Neither party called the third affiant to testify.

Henderson and Underwood personally loaded four of the seven transformers onto a trailer and removed the same from the Springfield location. Henderson freely admitted that the transformers were moved at night so as to avoid detection by

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[1] The Court notes that the affidavit which bears the name James Henderson, found as Plaintiff's Exhibit 9, was notarized by one Martin Schreibman. The same Martin Schreibman purportedly notarized a document found as Plaintiff's Exhibit 6. This second affidavit, purportedly signed by Tracy Westfall, was also denied by Tracy Westfall as bearing his signature.

state and local authorities. He admitted that the load was overweight, that no markings were placed on the truck indicating the transportation of hazardous materials, and that no manifest was prepared to accompany the transfer, all of which was in violation of state and federal law. Both Underwood and Henderson agreed in their testimony that Denune was present at the time the transformers were loaded onto the trailer and was personally aware of the fact that the transformers were about to be moved.

Denune testified that following the removal by Henderson and Underwood, he did not attempt to keep track of or later inspect the transformers. Henderson also testified that Denune and Dixie Distributing had not retained ownership interest in the transformers after they were removed from Springfield. While Denune admitted that he subsequently came onto the property leased by Top Dollar Liquidators at 4975 Hendron Road, Groveport, Ohio, Denune denied ever looking for the transformers or attempting to find the same.

This testimony is directly contradicted by Michael Walcutt, who later became involved with management of the property located on Hendron Road. Walcutt testified that Denune actually came to the premises and on several occasions walked around the trailer containing the four transformers. Walcutt testified that Denune actually opened the door and looked inside at the transformers on at least two occasions. Walcutt also testified that Henderson also told him that "he [Henderson] was hiding them [the transformers]."

While the invoice prepared by Denune described a sale of seven transformers to James Henderson and Top Dollar Liquidators, the actual transaction involved only four such transformers. No documents were presented at trial indicating that, in fact, only four such transformers were actually delivered

to Top Dollar Liquidators. Denune testified that after Henderson and Underwood failed to pick up the other three, he sold the remaining three (3) transformers to a Tracy Westfall for the sum of $100.00 each. The purchase agreement with Westfall was entered into in late summer of 1987.

Westfall and Denune had entered into a lease, dated August 13, 1987, for the demise of a portion of a warehouse located at 1707 Woodlawn Avenue in Columbus, Ohio. Immediately prior to the making of such lease, Westfall had been operating a salvage business from his garage consisting of 144 square feet located at his residence. Thereafter, Westfall and Denune entered into a lease of 4,500 square feet of warehouse space for the sum of $600.00 per month. The term of the lease began on September 1, 1987.

The same day, Denune testified that Westfall signed an affidavit verifying knowledge of the fact that the three transformers subject to sale contained PCBs and that the same were subject to stringent federal rules and regulations. Denune also testified that Westfall picked up the transformers.

Westfall denied ever signing such affidavit and testified that he might have signed a blank page later filled in by Denune. Westfall further contradicted Denune's testimony by claiming that Denune had arranged for the delivery of the transformers. Westfall did not test the transformers prior to purchase and had no known buyers at the time of purchase. The transformers discovered by the EPA in later investigations did not contain serial numbers. Westfall testified that he did not remove the serial numbers from the transformers and that the transformers came to his shop with the serial numbers already removed.

The testimony also revealed that Henderson and Westfall had no special training or technical expertise in installing or operating transformers. Both individuals were involved on a

full time basis in the salvage business. The third person to whom Denune sold three of the ten transformers originally obtained from Federal Paper Board Company. Inc., Abe Hjshoorniaged, did not testify in the case and the record contains no information as to his background in regard to the handling of transformers laden with PCBs.

On July 13, 1988, a Stephen Rumich made a complaint to the Ohio Environmental Protection Agency concerning leakage from four transformers placed on the Hendron Road site leased by Top Dollar Liquidators.[2] Rumich testified that he had been on the site the day before and noticed "at least two or possibly three [transformers] in a trailer and one for sure, possibly two, on the ground." He also described that one transformer was placed on its side in a position that permitted the draining off of the PCBs onto the ground. Rumich also recalled seeing a hole "hatched in the top" on one of the transformers. Rumich also testified that one of the employees working on the site told him with reference to the transformers that "we're scrapping them."

On the following day, Thomas Buchan, an inspector with the Ohio Environmental Protection Agency, came to the site. Based on the complaint of Rumich, Buchan requested permission to see the specific trailer in which the allegedly leaking transformers were located. Buchan was given permission and proceeded to inspect the Leeway trailer in which the transformers were located.

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[2] At the time of the complaint, Top Dollar Liquidators, apparently a partnership, was undergoing a reorganization. A new entity, Universal Liquidators, was formed by all the principals previously involved with Top Dollar Liquidators, with the exception of Woody Underwood.

In a series of reports, Buchan documented and photographed four transformers located in the Leeway trailer on the Hendron Road property. Two of the four transformers showed evidence of PCB leakage. One of the four transformers, located closer to the rear door, showed extensive leakage in the trailer and onto the ground. Buchan testified that this particular transformer looked as though a person had tried to pry open the bottom. In addition. three drums were located by the door of the same trailer. Two of these drums contained PCBs. The ground beneath the transformer had been contaminated by PCBs in an area of approximately ten to twenty feet.

Buchan was able to trace back ownership of the transformers. He attempted to contact Henderson and, after a certain delay, was able to reach him. Henderson originally denied having purchased the transformers and claimed that he did not sign the affidavit wherein Denune notified him that the transformers contained PCBs and that the same were subject to federal rules and regulations.

Buchan then met with Denune as part of his investigation of the Hendron Road spillage. Denune stated to Buchan that he had two transformers containing PCBs in his Teledyne building in Springfield, Ohio. Buchan then decided to inspect the seven Springfield properties owned by Denune and Dixie Distributing Company.

Acting on an anonymous tip, Buchan decided to set up overnight surveillance of Denune's Teledyne building in Springfield. At 7:00 a.m., a trailer left the Teledyne facility and drove to a location in Butler County, known as Canal Auto. The trailer contained five large PCB transformers with the tops removed. The truck was not properly marked as transporting hazardous materials. In addition to the PCB transformers, the truck contained quantities of paints, solvents and PCB-laden

capacitors. Denune was aware that an inspection of his Teledyne plant was scheduled to begin on the same morning that the truck left his property. Denune had previously told Buchan that he owned only two PCB-laden transformers, while in fact the Teledyne building contained five more which were found leaking at the Canal Auto site.

For the next several months, the EPA made attempts to cause a cleanup of the Hendron Road property through the use of private contractors retained by the owners or lessees of the property. By early 1989, Michael Walcutt and his father Dean Walcutt had become interested and involved in the property. Dean Walcutt had negotiated an option to purchase the property from Carter-Jones Lumber Company. The primary contingency in the exercise at the option to purchase involved the extent of cleanup effort required to remediate the environmental damage caused by the PCB spillage. By May of 1989, after various testing on the property, Dean Walcutt decided not to exercise the option.

In May of 1989, the Leeway trailer containing the four transformers on the Hendron Road property disappeared. Henderson testified that at no point did he contact local authorities to report the alleged theft, although Henderson continued to claim that the transformers had significant value and could be sold for upwards of $40,000.00. Further, Buchan testified that Henderson told him that he had in fact called the Groveport Police to report such thefts. Buchan discovered that Groveport did not have a police department but instead received protection from the Madison Township Police Department. Buchan checked with Madison Township Police and was advised that no report had been made as to a theft of a trailer from the Hendron Road property.

Ultimately, the EPA traced the transformers to the real estate located at 1725 Woodlawn Avenue, Columbus, owned by Denune and leased to Westfall. Inspector Buchan came to the premises and discovered a number of products containing PCBs including parts, windings, debris and free oil. Three cannibalized PCB transformers were found outside the building. In addition, the same four transformers located in the Leeway trailer on the Hendron Road property were discovered in the premises occupied by Westfall. Further, all of the transformers had identifying serial numbers removed. As previously noted, Westfall claimed that he did not remove the serial numbers and that the same had been taken off before he obtained possession. In light of Buchan's testimony that he observed and recorded the serial numbers during his inspection of July 14, 1988, the serial numbers would have been removed at a point somewhere between the date of inspection and the date that same transformers were discovered in Westfall's possession in May of 1989.

Ultimately, the Carter-Jones Lumber Company evicted its tenants from the Hendron Road property, including the reorganized Universal Liquidators as well as Michael Walcutt. After the issuance of an emergency order by the EPA ("106 Order"), Carter-Jones Lumber paid for remediation costs resulting from the PCB spillage in the amount of $3,888,000.00.

DISCUSSION

I. Liability Under CERCLA § 107(a)

The essential purpose of CERCLA is to place the ultimate responsibility for the cleanup of hazardous waste on "those responsible for problems caused by the disposal of chemical poison." *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313 (11th Cir. 1990).

A private plaintiff, in seeking to recover the response cost of cleanup of hazardous waste, may sue and recover its cleanup costs from responsible parties upon demonstrating liability under CERCLA and proving the following elements: (1) the site is a facility as defined in 42 U.S.C. § 9601(9); (2) the defendant in question is a covered person as defined in 42 U.S.C. § 9607(a); (3) a release or threatened release of a hazardous substance has occurred; (4) the release or threatened release has caused plaintiff to incur certain response costs, and (5) the costs incurred were necessary and consistent with the National Contingency Plan. *Prudential Ins. Co. Of America v. U.S. Gypsum*, 711 F. Supp. 1244, 1251 (D.N.J. 1989).

A. Is the property a "facility" as defined by CERCLA?

Title 42 U.S.C. § 9601(9) defines the term "facility." It reads in pertinent part: "The term 'facility' means ... (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located."

The term "hazardous substance" is defined at § 9601(14) of CERCLA by referencing several other federal environmental statutes. Pursuant to these statutory grants of authority, the EPA has promulgated several lists of hazardous or toxic substances. Polychlorinated biphenyls or PCBs is among the hazardous substances listed by the EPA. *See* 40 C.F.R. § 302.4 (Appendix A).

It is undisputed that Carter owned the Hendron Road site. PCB transformers were stored and later found leaking at this site. Inspectors from the Ohio EPA and the United States EPA discovered PCB-contaminated soil at the Hendron Road site. PCBs are on the EPA list of hazardous substances. Thus, the Court finds that the site is a "facility" as defined by CERCLA.

B. Are the Defendants "covered persons" under CERCLA?

Section 107(a) of CERCLA is the liability provision of this statute. It defines the four categories of "covered persons." Plaintiff Carter asserts that defendants Dixie Distributing and Harry Denune have "otherwise arranged for disposal" of the PCB transformers through business sales transactions. Plaintiff claims that defendants entered into an arrangement whereby defendants intended to dispose of the transformers. An "arranger for disposal" is a covered person under the statute and is defined as:

> . . . (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility . . . owned or operated by another party or entity and containing such hazardous substances;

42 U.S.C. § 9607(a)(3).

A covered person may include, inter alia, an individual, corporation, association or partnership. 42 U.S.C. § 9601(21).

1. Defendants Dixie Distributing and Harry Denune

"A liberal interpretation of the term arranged is required to achieve CERCLA's 'overwhelmingly remedial' statutory scheme." *Florida Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir. 1990). Yet, some courts have held that a mere sale of a product is not "arranging for disposal" under 107(a)(3) and liability only attaches to parties that have "taken an affirmative act to dispose of a hazardous substance ... as opposed to convey a useful substance for a useful purpose."

AM International, Inc. v. International Forging Equip. Corp., 982 F.2d 989, 999 (6th Cir. 1993) (quoting *Prudential Inc. Co. v. United States Gypsum*, 711 F. Supp. 1244, 1253 (D.N.J. 1989)).

Although CERCLA does not define the phrase "otherwise arranged for disposal," the Sixth Circuit more recently has read an intent or state of mind requirement into this concept. The requisite inquiry is whether the party intended to enter into a transaction that included an "arrangement for" the disposal of hazardous substances. *United States v. Cello-Foil Products, Inc.*, 100 F.3d 1227, 1231 (6th Cir. 1996). The intent need not be proven by direct evidence, but can be inferred from the totality of the circumstances. *Id.*

"Frequently, the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor." For normally the actor is presumed to have intended the natural consequences of his deeds." *Washington v. Davis*, 426 U.S. 229, 253 (Stevens, J. concurring).

Harry Denune originally negotiated the purchase of ten PCB transformers from Federal Paper Board. He testified that he planned to use seven of the transformers in a warehouse located in Springfield, Ohio. However, what actually happened to the ten transformers indicates that Dixie Distributing and Harry Denune arranged for the disposal of the transformers.

Three of the transformers were sold to an individual for whom no transactional paperwork is in evidence. These three transformers were apparently destroyed in a fire that also eventually ruined this individual's business.

Four more of the original ten transformers were then sold to Jim Henderson, a known salvage businessman. Henderson

never used these transformers and testified that he was going to resell them. He never reused or resold them, however. Instead, he transported them for storage to the Hendron Road site at which he leased space. They were transported in an unmarked trailer and at night to avoid detection by enforcement authorities. Testimony from Henderson and his business partner Woody Underwood demonstrate that Denune was personally aware that the transformers were going to be moved.

Denune sold the remaining three transformers to Tracy Westfall, an individual who also makes his living in the salvage business. Denune was aware of Westfall's occupation and arranged for the delivery of the transformers to Westfall. These transformers came to Westfall with the identifying serial numbers already removed. The absence identifying numbers lessens the ability to trace the ownership trail of the PCB transformers. Transformers being sold for later use must have identifying serial numbers. Removing the serial numbers is an affirmative act taken in the process of disposing of hazardous PCB-laden transformers.

The most probative evidence of the real intent of these "sales," that Dixie Distributing and Denune arranged for the disposal of the transformers, is the fact that none of the ten transformers was ever used for a useful purpose after any of the "sales." All were destroyed.

The Court, thus, infers from the objective evidence and the totality of the circumstances that Dixie Distributing and Harry Denune did not enter into "mere sales" of a product, but rather intended to arrange for the disposal of the transformers which were eventually found by the EPA to have leaked hazardous PCB oils into the soil at the Hendron Road facility.

As a corporate officer of Dixie Distributing, Harry Denune may be held personally liable for response costs related to the

PCB cleanup. Courts have not hesitated to hold corporate individuals liable for unlawful hazardous waste practices. *See Kelley v. Thomas Solvent Co.*, 727 F. Supp. 1554 (W.D. Mich. 1989); *United States v. Northeastern Pharmaceutical & Chemical Co.*, 810 F.2d 726 (8th Cir. 1986). Courts have also held those officers and shareholders liable who have engaged in the wrongful conduct that lead to the discharge of hazardous substances. *Northeastern*, 810 F.2d at 745.

To determine whether a corporate officer is in a position to prevent the discharge of hazardous substances, the court in *Kelley* weighed factors related to the individual's authority to control waste disposal practices and the responsibility undertaken for the same. These factors include whether the individual holds the position of officer or director, distribution of power within the corporation, percentage of shares owned, and evidence of responsibility undertaken and neglected for waste disposal practices. These factors are applied to determine whether the individual in the close corporation could have prevented or significantly abated the hazardous waste discharge.

Harry Denune was, at all relevant times to this case, president of Dixie Distributing, and its sole owner and stockholder. The land on which Dixie Distributing housed some of its warehouses was titled in the sole name of Harry Denune. He personally negotiated the initial purchase of the PCB transformers from FPB and inspected them for leakage. He then personally handled the subsequent sale to Henderson and Westfall. In addition, Mr. Denune signed affidavits of sale without a designation that the documents were executed on behalf of Dixie Distributing. Denune's corporate position and his business conduct indicate that he had the power and authority to control Dixie Distributing's waste disposal practices.

Being the president and sole shareholder, Denune was responsible for Dixie Distributing's waste disposal practices. Denune knew the dangers of the PCB transformers. He signed an affidavit as a buyer and later signed and prepared an identical document as a seller wherein the seller notifies the purchaser of the presence of PCB contaminants and that the same are subject to federal rules and regulations. Yet, Denune failed to insure that the transformers were handled and disposed of properly. He did not regularly inspect them and he did not prepare manifests which are required whenever PCB transformers are transported. In the end, Denune sold PCB transformers to two known salvagers, Henderson and Westfall. This conduct demonstrates irresponsible behavior related to Dixie Distributing's waste disposal practices. The evidence shows that Harry Denune had both the authority and the ultimate responsibility to control, prevent, or significantly abated the hazardous waste discharge. Thus, Mr. Denune may be held personally responsible for the response costs related to the Hendron Road site cleanup.

Once a party has been determined to have the requisite intent to be an arranger, then strict liability takes effect. *Cello-Foil Products, Inc.*, 100 F.3d at 1232 (6th Cir. 1996). If an arrangement has been made, that party is liable for damages caused by the disposal regardless of the party's intent that the damages not occur. Moreover, a party can be responsible for "arranging for" disposal, even when it has no control over the process leading to the release of substances. *Id.*

Therefore, under CERCLA § 9607(a)(3), the Court finds that Dixie Distributing and its president Harry Denune are arrangers for the disposal of transformers containing PCBs, a hazardous substance as defined by the CERCLA statute. As such, defendants are "covered persons" who are liable to plaintiff

Carter-Jones Lumber Company for contribution of response costs.

2. Plaintiff Carter

Carter-Jones Lumber may also be held liable for response costs as a current owner of a facility at which hazardous substances were disposed. CERCLA defines the term "disposal" by reference to the Solid Waster Disposal Act, 42 U.S.C. § 6903(3).[3] The evidence revealed that PCBs, a hazardous substance, were leaked onto and into the land at the Hendron Road site. The PCBs were, thus, disposed of at the Carter facility.

"Any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of" . . . shall be liable for cleanup costs. 42 U.S.C. § 9607(a)(2). There is no dispute that Carter owned the Hendron road property at the time the PCB spill occurred. Furthermore, the plain language of CERCLA § 107(a)(2) extends liability to owners of facilities, regardless of their degree of participation in the disposal of hazardous wastes. *United States v. Monsato Co.*, 858 F.2d 160, 166-68 (4th Cir.), *cert. denied*, 490 U.S. 1106 (1989). As the landowner, Carter is a "covered person" as defined by CERCLA and may also be held liable for response costs as a responsible party.

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[3] The Solid Waste Disposal Act provides:

> [t]he term "disposal" means the discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.

C. Was there a release or threatened release of a hazardous substance from a facility which caused plaintiff to incur response costs?

The term "release" is defined under CERCLA as:

> any spilling, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant) ....

42 U.S.C. § 9601(22). The term release is construed broadly ... There is no minimum quantitative requirement for a release of hazardous substances. *See Stewman v. Mid-South Wood Prods. of Mena. Inc.*, 993 F.2d 646, 649 (8th Cir. 1993); *Amoco Oil Co. v. Borden, Inc.*, 889 F.2d 664, 669 (5th Cir. 1989). The term "environment" under CERCLA includes "any . . . land surface, or subsurface strata . . ." 42 U.S.C. § 9601(6).

The evidence demonstrated that the PCB-contaminated soil at the Hendron road site was widespread. Reports from qualitative and quantitative testing by the Ohio EPA and the U.S. EPA indicate that PCB-contaminated soil covered an area of several yards long and, in some places, seventeen feet deep. In fact, over 800 truckloads or 16,000 tons of contaminated soil were removed from the site. The evidence also revealed that PCB transformers leaked on the property and the parties do not dispute this fact. Therefore, plaintiff Carter has established that there was a release or threat of release of hazardous substances at the Hendron Road facility.

Plaintiff must also demonstrate that the release or threat of release of a hazardous substance caused it to incur response costs. Plaintiff established, and defendants do not dispute, that it incurred response costs as a result of the release of PCBs at

the property, that the response costs have been paid on checks from Carter-Jones Lumber Company and all of these checks have been honored. See Plaintiff's Exhibit 21. Thus, the Court finds that plaintiff incurred response costs as a result of the release of a hazardous substance, PCBs, at the Hendron Road facility.

D. Were the costs incurred necessary costs of response and did plaintiff comply with the requirements of the National Contingency Plan?

Under CERCLA, if the release or threat of release of hazardous substances causes the incurrence of response costs, a covered person is liable for the "necessary costs of response incurred consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B). Plaintiff submitted to the Court two binders containing cost documentation for response actions taken at the facility. The parties have stipulated to the necessary response costs in this case and that plaintiff complied with the National Contingency Plan ("NCP"). That cost equals $3,394,821.17. The Court finds that such costs were necessary to respond to the contamination and that such costs were reasonable and necessary to remove the contamination.

Plaintiff Carter has thus proved by a preponderance of the evidence the elements set out in 42 U.S.C. § 9607, and has thereby demonstrated liability for response costs on the part of Dixie Distributing and Harry Denune.

II. Contribution Under CERCLA § 113(f)

By virtue of its ownership of the Hendron Road facility, Carter is a potentially responsible party ("PRP"). The Court has determined that defendants Dixie Distributing and Harry Denune are also responsible parties. *See* Section I, *supra*. A claim by one PRP against another is one solely for contribution.

United States v. Colorado and Eastern R. Co., 50 F.3d 1530 (10th Cir. 1995); *Plaskon Electronic Materials, Inc. v. Allied-Signal, Inc.*, 904 F. Supp. 644, 651-52 (N.D. Ohio 1995). Any claim that would reapportion costs between these parties is the quintessential claim for contribution. *See* Restatement (Second) of Torts Section 886A (1979); *Amoco Oil Co. v. Borden Inc.*, 889 F.2d 664, 672 (5th Cir. 1989) ("[w]hen one liable party sues another to recover its equitable share of the response costs, the action is one for contribution, which is specifically recognized under CERCLA"). The Court ruled in its Order of January 14, 1997 that plaintiff was limited to pursuing a claim of contribution under 42 U.S.C. § 9613(f).[4] Based on stipulations by the parties and the Court's analysis of prejudgment interest, the Court concludes that plaintiff has incurred recoverable response costs under CERCLA in the amount of $2,771,863.72. *See* Section III, *infra*.

CERCLA offers little specific guidance regarding allocation of liability in a contribution action. In resolving contribution claims, CERCLA provides that "the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613)(f)(1). By using the term "equitable factors" Congress intended to invoke the tradition of equity under the court must construct a flexible decree balancing all the equities in the light of the totality of the circumstances. *United States v. R.W. Meyer, Inc.*, 932 F.2d 568, 572 (6th Cir. 1991). Federal courts

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[4] Title 42 U.S.C. § 9613(f)(1) provides in relevant part:

> Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. . . .

have looked to the "Gore Factors" for the purpose of allocating liability under 9613(f)(1) of CERCLA. The Gore factors are:

1) the ability of the parties to demonstrate that their contribution to a discharge release or disposal of a hazardous waste can be distinguished;

2) the amount of the hazardous waste involved;

3) the degree of toxicity of the hazardous waste involved;

4) the degree of involvement by the parties in the generation, transportation, treatment, storage, or disposal of the hazardous waste;

5) the degree of care exercised by the parties with respect to the hazardous waste concerned, taking into account the characteristics of such hazardous waste; and

6) the degree of the cooperation by the parties with Federal, State or local officials to prevent any harm to the public health or the environment.

United States v. R.W. Meyer, Inc., 932 F.2d 568, 571 (6th Cir. 1991).

CERCLA gives the court considerable latitude in determining each party's liability. The Court will use the Gore Factors as its guide in balancing the equities to determine the allocation of liability among the parties in this case.

Plaintiff Carter-Jones Lumber was the owner of the facility at which hazardous substances were disposed. Although it was not actively involved in or contribute to the disposal of the PCB transformers, plaintiff is liable as the land owner. The amount of hazardous waste involved was significant and the toxicity of PCB is very high. Plaintiff did not personally transport, store, or dispose of the hazardous waste. Yet,

plaintiff did not exercise a high degree of care with respect to its tenant's use of the real estate. Plaintiff did not regularly inspect the Hendron Road facility which its tenants had turned into a salvage yard. Plaintiff relied on Mike Walcutt's representations that he would clean up site. Plaintiff did not begin cleanup immediately, waiting two years before serious cleanup efforts began. At the same time, EPA representatives testified that Carter cooperated with the agency after it became clear that Walcutt would not perform the cleanup. Further, Carter did not transport, or discharge the hazardous substances. Carter's liability is predicated solely on ownership of the facility from which hazardous substances were released.

By contrast, conduct by Denune and Dixie Distributing is a much more egregious nature. These defendants caused the transportation of PCBs with no manifest and no labels on the truck at night to avoid detection by enforcement officials. These defendants deliberately tried to block EPA inspection by moving the transformers at night with no labels and no serial numbers. Denune lied to EPA inspectors by claiming he had only two transformers when he actually had five. Further, as previously concluded, Dixie Distributing and Denune deliberately arranged for the unlawful disposal, rather than the sale for a useful purpose, of PCB transformers which contained the very materials resulting in the cleanup costs.

Joint and several liability may be imposed on a responsible party, even though its role in creating the hazardous site was small, if the harm is indivisible. *United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983); *see also, The Anspec Co., Inc. v. Johnson Controls, Inc.*, 922 F.2d 1240 (6th Cir. 1991). Although CERCLA does not provide explicitly for joint and several liability of responsible parties, Congress intended for the scope of liability under CERCLA to be determined in accordance with "traditional and evolving principles of

common law." *Chem-Dyne*, 572 F.2d. at 808. In accordance with these principles, CERCLA has been interpreted to impose joint and several liability when the environmental harm is indivisible. *United States v. Monsato Co.*, 858 F.2d 160. 171-73 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

Harry Denune was the president of Dixie Distributing. The hazardous substances found at the Hendron Road site were attributed to the PCB transformers stored at the site — the same transformers that Denune arranged to have disposed. The damage caused by the PCB transformer leakage is indivisible as between Dixie Distributing and its president Harry Denune. The transportation, disposal and eventual leakage of the hazardous substance cannot be attributed solely to either Denune or Dixie Distributing. Therefore, the Court finds that the damage to the Hendron Road site was indivisible and imposes joint and several liability on Denune and Dixie Distributing to reimburse plaintiff Carter for the response costs for the cleanup at the facility.

III. Prejudgment Interest

Title 42 U.S.C. § 9607(a) sets forth the type of costs recoverable by the plaintiff in this action. In addition to setting forth a list of recoverable costs, CERCLA § 9607(a)(4)(D) also provides:

> The amounts recoverable in an action under this section shall include interest on the amounts recoverable. . . . Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under Subchapter A of Chapter 98 of Title 26.

> For purposes of applying such amendments to interest under this subsection, the term 'comparable maturity' shall be determined with reference to the date on which interest accruing under this subsection commences.

Subchapter A of Chapter 98 of Title 26, as referenced above, states:

> (C) *Rate of Interest.* Interest on advances made to the Superfund shall be at a rate determined by the Secretary of the Treasury (as of the close of the calendar month preceding the month in which the advance is made) to be equal to the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the anticipated period during which the advance will be outstanding and shall be compounded annually.

While the foregoing may seem relatively straightforward, actual computation of interest in this particular case presents a number of difficult issues of computation. To their credit, the parties in this case have narrowed what could otherwise be a rather complex mathematical analysis to several limited issues of law. Further, the parties have stipulated the amount of interest payable under the different theories advanced by each of the parties.

The plaintiff submits that it is entitled to interest from June 9, 1992, at which time a demand letter was sent from the plaintiff to the defendants. The demand letter included a claim of only $1.6 million, substantially less than the total cost of the cleanup (excluding interest) which the parties have agreed equals $3,394,821.17. The plaintiff also has presented an interest computation which attributes to each payment made an interest rate computed for the same period during which such

payment was made. Such interest rate is then locked-in from the time of payment through the present.

The defendants argue that the amount of prejudgment interest should be limited to the $1.6 million referenced in the June 9, 1992, demand letter from plaintiff s counsel to the defendants. Further, the defendants argue that the rate assessed as to each partial payment by the plaintiff should float. While this concept involves a rather complex mathematical analysis, the parties have agreed on an amount of interest which would correspond with this theory of the defendant.

The three different positions outlined above are summarized as follows:

A. Plaintiff's Position

This computation includes interest running from June 9, 1992, on $1.6 million and interest running on all payments made thereafter by Carter from the time of payment to the present. The rate applied is a rate computed on each month that a payment is made with such rate being locked-in to the present. This position yields an interest charge of $1,159,726.82. When this amount is added to the total cleanup cost, the total of both charges is $4,554,547.99, minus settlements, interest credit and payments still due to the plaintiffs for a total charge of $2,912,891.57. While the defendants do not agree with this position, the parties do not dispute the interest computation.

B. Defendants' Positions

The defendants make two arguments in opposition to the plaintiff's computation as described above. First, the defendant argues that interest should only run on $1.6 million referenced in the demand letter from plaintiff's counsel and sent on June 9, 1992. The Court rejects this argument. CERCLA § 107 states that interest shall begin on the later of (1) the date

payment of a specified amount is demanded in writing, or (2) the date of the expenditure incurred. By the time the demand letter was sent, $1.6 million in expenditures had occurred. The plaintiff is not seeking interest on that amount prior to June 9, 1992. Further, for all amounts in excess of $1.6 million, the plaintiff is only seeking interest following the date of the expenditure of such amount. While the demand letter underestimated the cost of cleanup, the letter was accurate in describing the amount of the costs as of the date of the letter. There is no justification for denying plaintiff's further charges on amounts spent after the date of such letter.

The defendant also disagrees with the rate utilized by the plaintiffs in determining the amount of interest. Under plaintiff's computation, each month an expenditure was made, an interest rate was derived based upon the language of the statutes quoted above. Such rate would then be locked-in for the duration of the period during which interest accrues. Since 1992, interest rates have generally fallen. Defendants submit that a fluctuating rate should be used that would encompass such interest rate decline.

The Court accepts this argument. The purpose of prejudgment interest is to make a plaintiff whole. *Devex Corporation v. General Motors Corporation*, 579 F. Supp. 690 (D.C. Delaware), aff'd 746 F.2d 1466 (3d Cir. 1985).

The Court finds that the appropriate calculation includes computation of interest from June 9, 1992 on $1.6 million and interest on remaining amounts expended by the plaintiff to a total of $3,394,821.17. The amounts expended by the plaintiff after June 9, 1992 will accrue interest commencing on the month of any such additional expenditures.

While the rate of interest must be computed with reference to 26 U.S.C. § 9507(d)(3)(c), the statute does not clarify whether

the rate is locked-in on a given date or is to be adjusted as the market yield on outstanding treasury obligations of the United States change from period to period. The Court finds that a more equitable way to make plaintiff's whole through prejudgment interest is to compute a floating rate based upon changes in the market yield in United States treasury obligations. In this way, the true cost of monies withheld by a defendant is more realistically gauged.

The parties have agreed, without waiving any objection to the above legal conclusions, that the appropriate computation using the Court's findings are as follows:

(a)	Total cost for cleanup	$3,394,821.17
(b)	Total interest on land cleanup cost	$ 982,521.20
	Subtotal	$4,377,342.38
	Minus settlement received related to land	($1,345,000.00)
	Minus interest credit	($140,478.66)
	Minus due from FIP Realty	($120,000.00)
	Net Cost	$2,771,863.72

This final computation reflects settlement payments received by the plaintiff from other responsible parties to the cleanup. Further, the defendants have received an interest credit derived from the payment to the plaintiff of such settlement amounts. The Court finds that the sum of $2,771,863.72 represents the cost of cleanup together with the statutory prejudgment interest computed through March 5, 1997.

Based upon the foregoing, the Court finds plaintiff Carter-Jones Lumber to be a responsible party and, therefore, liable for response costs. The Court finds defendants Dixie Distributing and Harry Denune liable to plaintiff Carter for contribution to response costs. The Court apportions 20% equitable share of

liability to plaintiff for response costs, 30% equitable share of liability to Harry Denune for response costs, and 50% equitable share of liability to Dixie Distributing for response costs.

CONCLUSIONS OF LAW

Based on the findings of fact above, the Court concludes:

1. The Hendron Road site is a facility as defined by CERCLA, 42 U.S.C. § 9601(9).

2. There was a release of hazardous substances at the site as defined by 42 U.S.C. § 9601(14) and (22).

3. The release caused Carter-Jones Lumber to incur necessary response costs at this site as defined by 42 U.S.C. § 9607.

4. The release caused Carter-Jones Lumber to incur reasonable and necessary removal costs at the site as defined by 42 U.S.C. § 9607.

5. Carter-Jones Lumber is a responsible person as an owner and operator of the site at the time hazardous substances were released there as defined by 42 U.S.C. § 9607.

6. Dixie Distributing is a responsible person as an arranger of disposal of hazardous substances at the site as defined by 42 U.S.C. § 9607.

7. Harry Denune is a responsible person as an arranger of disposal of hazardous substances at the site as defined by 42 U.S.C. § 9607.

8. Dixie Distributing, Harry Denune and Carter-Jones Lumber are all liable for contribution as defined by 42 U.S.C. § 9613(f).

9. Carter-Jones Lumber has incurred $3,880,653.29 in costs necessary to respond to the releases at the site as defined by 42 U.S.C. § 9607.

10. The necessary response costs incurred by Carter-Jones Lumber are consistent with the National Contingency Plan ("NCP"), 40 C.F.R. Part 300. et seq.

11. The reasonable and necessary removal costs of $3,880,654.29 incurred by Carter-Jones Lumber are consistent with the NCP, 40 C.F.R. Part 300, et seq.

12. The total cost related to the land cleanup at the Hendron Road site amounted to $3,394,821.17.

13. The prejudgment interest on land cleanup totaled $982,521.20.

14. The net cost of the Hendron Road site land cleanup (minus interest credit and settlement monies) amounted to $2,771,863.72.

15. Carter-Jones Lumber is entitled to judgment declaring that Dixie Distributing is a responsible party and 50% liable for the net response costs and removal costs incurred by Carter-Jones Lumber in accordance with 42 U.S.C. §§ 9607 and 9613(f), provided that Dixie Distributing and Harry Denune shall be jointly and severally liable for the amount.

16. Carter-Jones Lumber is entitled to judgment declaring that Harry Denune is a responsible party and 30% liable for the net response costs and removal costs incurred by Carter-Jones Lumber in accordance with 42 U.S.C. §§ 9607 and 9613(f), provided that Dixie Distributing and Harry Denune shall be jointly and severally liable for the amount.

17. Carter-Jones Lumber is a responsible party and 20% liable for the net response costs and removal costs incurred by

Carter-Jones Lumber in accordance with 42 U.S.C. §§ 9607 and 9613(f).

Accordingly, **IT IS HEREBY ORDERED** that:

1. There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk shall enter final judgment declaring that defendant Harry Denune is 30% responsible for the net response costs totaling $2,771,863.72 incurred by plaintiff Carter-Jones Lumber to remediate the contaminated site located at 4975 Hendron Road, Groveport, Ohio, and that both Harry Denune and Dixie Distributing are jointly and severally liable for such amount.

2. There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk shall enter final judgment declaring that defendant Dixie Distributing is 50% responsible for the net response costs totaling $2,771,863.72 incurred by plaintiff Carter-Jones Lumber to remediate the contaminated site located at 4975 Hendron Road, Groveport, Ohio, and that both Harry Denune and Dixie Distributing are jointly and severally liable for such amount.

3. There being no just reason for delay, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the Clerk shall enter final judgment declaring that plaintiff Carter-Jones Lumber is 20% responsible for the net response costs totaling $2,771,863.72 incurred by plaintiff Carter-Jones Lumber to remediate the contaminated site located at 4975 Hendron Road, Groveport, Ohio.

IT IS SO ORDERED.

/s

EDMUND A SARGUS, JR.
United States District Judge

3-31-97

Date

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION

Case No. C2-92-1161
Judge Edmund A. Sargus, Jr.
Magistrate Judge Kemp

CARTER-JONES LUMBER COMPANY,
Plaintiff,

v.

LTV STEEL COMPANY, et al.,
Defendants.

ORDER NUNC PRO TUNC

To clarify the final judgment in this matter, the Court **HEREBY ORDERS** the following:

1. Having been found liable for the contamination of the site located at 4975 Hendron Road, Groveport, Ohio, the Court directs the Clerk to enter final judgment declaring that defendant Harry Denune is 30% responsible for the net response costs. The amount of $831,559.11 shall be paid to plaintiff Carter-Jones Lumber in contribution for costs already incurred. Both Harry Denune and Dixie Distributing are jointly and severally liable for such amount.

2. Having been found liable for the contamination of the site located at 4975 Hendron Road, Groveport, Ohio, the Court directs the Clerk to enter final judgment declaring that defendant Dixie Distributing is 50% responsible for the net response costs. The amount of $1,385,931.90 shall be paid to plaintiff Carter-Jones Lumber in contribution for costs already

incurred. Both Harry Denune and Dixie Distributing are jointly and severally liable for such amount.

3. Having been found liable for the contamination of the site located at 4975 Hendron Road, Groveport, Ohio, the Court directs the Clerk to enter final judgment declaring that plaintiff Carter-Jones Lumber is 20% responsible for the net response costs. Carter-Jones Lumber is responsible for the amount of $554,372.74.

IT IS SO ORDERED.

/s
EDMUND A. SARGUS, JR.
United States District Judge

4-4-97
Date

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C2-92-1161
Judge Edmund A. Sargus, Jr.
Magistrate Judge Kemp

CARTER-JONES LUMBER COMPANY,
Plaintiff,

v.

LTV STEEL COMPANY, et al.,
Defendants.

ORDER CLARIFYING AND AMENDING JUDGMENT

This case involved the contamination of land by hazardous substances and the eventual recovery of clean up costs under 42 U.S.C. § 9613(f). On March 31, 1997, following bifurcated trials to the Court, this Court issued its Findings of Fact and Conclusions of Law ("Decision"). In its Order Nunc Pro Tunc filed on April 4, 1997, the Court clarified the judgment entry to reflect its finding of joint and several liability against defendants Dixie Distributing company and its president, Harry Denune. Defendants now move the Court for partial reconsideration of the Court's decision and order with respect to the imposition of joint and several liability.

This was an action by a private party, Carter-Jones Lumber, for contribution under CERCLA § 113, 42 U.S.C. § 9613(f). The Court determined that Carter Lumber was a "covered person" as defined by 42 U.S.C. § 9607(a)(2) and, thus, liable for response costs incurred as a current owner of a facility at

which hazardous substances were disposed. "[A]ll responsible parties . . . are confined to bringing actions under 42 U.S.C. § 9613(f)." *United Technologies v. Browning-Ferris Inds., Inc.*, 33 F.3d 96, 98 (1st Cir. 1994). "In resolving contribution claims, the court may allocate response costs among liable parties using such factors as the court determines are appropriate." 42 U. S. C § 9613(f).

II.

Generally, there are three major situations which justify a court to reconsider one of its orders: "(1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error or to prevent manifest injustice." *Plaskon Electronic Materials Inc. v. Allied-Signal, Inc.*, 904 F. Supp. 644, 669 (N.D. Ohio 1995), citing *Bermingham v. Sony Corp. of America, Inc.*, 820 F. Supp. 834, 856 (D.N.J. 1992), *aff'd*, 37 F.3d 1485 (3rd Cir. 1993).

III.

Defendants assert that liability under CERCLA section 113 can only be several. *Plaskon Electronic Materials, Inc. v. Allied-Signal, Inc.*, 904 F. Supp 644, 651 (N.D. Ohio 1995) (stating that "liability under § 107 (a) is joint and several, while liability under § 113(f) is merely several."). *See also, Dartron Corp. v. Uniroyal Chemical Co., Inc.*, 917 F. Supp. 1173, 1181 (N.D. Ohio 1996). The Court notes that the SARA amendments to CERCLA, which include section 113, were designed to ameliorate the harshness of the joint and several liability aspect of section 107.

Plaintiff cites a Sixth Circuit case that states, "where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm." *United States v. R.W. Meyer*, 889 F.2d 1497, 1507 (6th Cir. 1989), citing Restatement

(Second) of Torts § 875. Plaintiffs further argue that CERCLA has been interpreted to impose joint and several liability when environmental harm is indivisible and to allow for apportionment when two or more persons independently are responsible for a single harm. *Id.; see also, United States v. Monsato Co.*, 858 F.2d 160, 171-73 (4th Cir. 1988).

As defendants correctly point out, however, the *R.W. Meyer* case was not an action by a private party for contribution under CERCLA section 113, as is the situation in the case at bar. In addition, the *Monsanto* case involved the imposition of liability under CERCLA section 107, not section 113. These cases are inapposite to the instant case. Thus, even though, the Court determined that each defendant in the instant case caused the indivisible environmental harm at the Hendron Road site, their liability must still be several as a matter of law.

IV.

Thus, based on the above reasons and to correct clear error and prevent manifest injustice, the Court amends its judgment with respect to the imposition of joint and several liability against defendants Harry Denune and Dixie Distributing. Defendants' motion for partial reconsideration is, hereby, **GRANTED.** Pursuant to 42 U.S.C. § 9613(f), the Court apportions liability for the clean-up costs in this matter as delineated in its original judgment. Each defendant is responsible for its individual and several share of liability.

IT IS SO ORDERED.

/s

EDMUND A. SARGUS, JR.
UNITED STATES DISTRICT JUDGE

DATED: May 30, 1997

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

99-4241

CARTER-JONES LUMBER COMPANY,
Plaintiff-Appellee,

v.

LTV STEEL COMPANY, ET AL.,
Defendants,

DIXIE DISTRIBUTING COMPANY, ET AL.,
Defendants-Appellants.

ORDER

BEFORE: BOGGS and SUHRHEINRICH, Circuit Judges; and ALDRICH,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

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*Hon. Ann Aldrich, Senior United States District Judge for the Northern District of Ohio, sitting by designation.

ENTERED BY ORDER OF THE COURT

/s

Leonard Green, Clerk

DATED: March 16, 2001

APPENDIX H

42 U.S.C. § 9607(a)

Section 9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date.

Notwithstanding any other provision of rule of law, and subject only to the defenses set forth in subsection (b) of this section–

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for–

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

APPENDIX I

42 U.S.C. § 9613(f)(1)

Section 9613. Civil proceedings

* * *

(f) Contribution

(1) Contribution

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 9606 of this title or section 9607 of this title.

Supreme Court, U.S.
FILED
MAY 11 2001
OFFICE OF THE CLERK

No. 00-1615

In The

Supreme Court of the United States

DIXIE DISTRIBUTING COMPANY and
HARRY C. DENUNE,

Petitioners,

v.

CARTER-JONES LUMBER COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Counsel for Respondent

**Counsel of Record*

May 11, 2001

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the court of appeals correctly applied Ohio's common law in deciding whether to pierce the corporate veil to hold a shareholder derivatively liable for a corporation's violations of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601, *et seq.*

2. Whether the court of appeals properly exercised its discretion in declining to certify a question to the Ohio Supreme Court concerning the proper application of Ohio's common law of corporate veil-piercing.

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Sup. Ct. R. 29.6, Carter-Jones Lumber Company declares that it is a wholly owned subsidiary of Carter-Jones Companies, Inc. No publicly held company owns more than 10 percent of Carter-Jones Companies, Inc.'s stock.

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RULE

Sup. Ct. R. 10 6

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Carter-Jones Lumber Company hereby opposes the petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit in this case.

STATEMENT

The only question actually posed in this case is whether the Sixth Circuit properly applied Ohio's common law standards governing piercing the corporate veil in holding a shareholder liable derivatively for violations of CERCLA committed by a corporation. It is difficult to imagine a question more unworthy of certiorari by this Court. The questions petitioners purport to present in order to avoid the fatal weakness in seeking review of the actual holding below simply are not posed. The court of appeals did not decide any question under CERCLA; instead, the parties **agreed** to treat veil piercing as solely a question of Ohio law, and thus, all that the court of appeals decided was the proper state-law standard to use. In so doing the court below applied the most directly relevant Ohio Supreme Court precedent in a manner fully consistent with the way that opinion had been applied by three intermediate state courts of appeals. Petitioners conceded below in their certification motion that the question whether to certify was committed to the sound discretion of the court of appeals. App., *infra*, 3a. Nothing in its unwritten decision not to certify poses any question suitable for review by this Court. In sum, the petition should be denied.

1. Respondent was the owner of property in Groveport, Ohio, on which polychlorinated biphenyls ("PCBs"), a hazardous substance under CERCLA, were disposed. Respondent cleaned up the PCBs at a cost of $3,880,000, and then brought suit against petitioners in the United States District Court for the Southern District of Ohio for contribution. Petitioners are Dixie Distributing Company and its sole shareholder, Harry C. Denune.

In 1985, Denune purchased ten transformers that contained PCBs and arranged to dispose of them. Ultimately, four of those transformers were stored at the property owned by respondent, but leased to a third party. This disposal was unquestionably in violation of CERCLA. The litigated issue thus became the extent to which Denune should be held personally responsible for his blatantly illegal conduct. "While Denune did not control every aspect of Dixie's affairs or every transaction, he clearly controlled the particular transactions that constituted the CERCLA violations for which Dixie was found liable." Pet. App. 4a.

2. The district court after a bench trial held in its initial decision that Denune was directly responsible for 30 percent of the response costs and that Dixie Distributing was 50 percent responsible. Pet. App. 69a. Denune and Dixie, however, were jointly and severally liable for Dixie's share (*id.* at 70a), which was significant because Dixie had become insolvent by the time of the district court's decision (*id.* at 20a). The court of appeals affirmed Denune's direct liability, but remanded the issue of Denune's joint liability for Dixie's share of the recovery costs to the district court for a determination under Ohio's veil-piercing standards, which the court of appeals

held was necessary in light of this Court's decision in *United States* v. *Bestfoods*, 524 U.S. 51 (1998). Pet. App. 34a.

On remand, the district court applied Ohio law to decide whether to pierce Dixie's corporate veil in order to hold Denune jointly liable for the damages award imposed on the corporation. Applying the Ohio Supreme Court's leading opinion on the issue, *Belvedere Condominium Unit Owners' Ass'n* v. *R.E. Roark Cos.*, 617 N.E.2d 1075 (Ohio 1993), the district court found that "the conduct attributable to [Dixie] was, to a great extent, the conduct of [Denune]." Pet. App. 21a. Accordingly, the district court concluded that "Denune had the requisite control to pass the first prong of the *Belvedere* test." *Id.*

3. The Sixth Circuit affirmed. On the preliminary question of whether state or federal law applied, the court noted that petitioners had not argued for a federal rule of decision and thus the sole question was the proper application of Ohio law. Pet. App. 2a n.1. Relying upon the Ohio Supreme Court's decision in *Belvedere*, the court of appeals concluded that Dixie " 'had no separate mind, will, or existence of its own' " as applied to the disposal of the transformers. *Id.* at 6a. In holding that a transaction-specific analysis was warranted under Ohio law in piercing the corporate veil, the court of appeals relied upon intermediate appellate court decisions in Ohio that had applied the *Belvedere* "control" test to isolated transactions. *Id.* at 9a-10a (citing *Janos* v. *Murduck*, 109 Ohio App. 3d 583, 672 N.E.2d 1021 (1966); *Wiencek* v. *Atcole Co.*, 109 Ohio App. 3d 240, 671 N.E.2d 1339 (1996); *Sintel, Inc.* v. *Budget Sys.*, No. 74249, 1999 Ohio App. LEXIS 2774 (Ohio Ct. App. June 17, 1999)).

In response to petitioners' argument that *Bestfoods* did not permit Denune to be held liable derivatively, the court's answer was that *Bestfoods* commanded the courts to look to the common law on veil piercing to determine when to hold a corporate shareholder liable for actions taken by the corporation. Pet. App. 11a. The court recognized that it was "a coincidental fact" that Ohio law imposed derivative liability in circumstances where CERCLA imposes direct liability. *Id.* Nonetheless, petitioners had not argued for a rule other than Ohio's to be applied and thus there was no need to "harmonize" common law rules and the statutory scheme. *Id.*

ARGUMENT

Petitioners' primary claim is that the decision below conflicts with this Court's decision in *Bestfoods*. Alternatively, petitioners begrudgingly and implicitly acknowledge that the only real issue in this case arises under Ohio law and thus they argue that the Sixth Circuit erred in not certifying that question to the Ohio Supreme Court.

There is no conflict between the holding here and *Bestfoods*. The court of appeals understood clearly the difference between direct and derivative liability and followed precisely the course set down by this Court in *Bestfoods* by deciding that the State's common law rules required piercing the corporate veil to hold Denune liable in this case. As for the second issue, petitioners made none of the arguments below that they trumpet in this Court. Instead, they blandly invited the Sixth Circuit in

the exercise of its discretion to certify the issue to the Ohio Supreme Court. Because the State's highest court already had established the fundamental standard of law and the State's intermediate appellate courts had consistently applied that test to isolated transactions, the court of appeals rightly declined, without opinion, to certify any questions. That action was no abuse of discretion, and thus the petition should be denied.

1. Contrary to petitioners' assertion (Pet. 9-12), there is nothing inconsistent between the holding below and this Court's decision in *Bestfoods*. To be sure, this Court adopted a distinction between direct and derivative liability, but the Court recognized that a shareholder could be "charged with derivative CERCLA liability" whenever "the corporate veil may be pierced." 524 U.S. at 62-64. The court of appeals here properly applied that rule and concluded that Ohio would pierce the corporate veil in the circumstances posed in this case. Accordingly, this is a garden variety application of *Bestfoods* and in no event conflicts with that decision.

As the court of appeals recognized, petitioners' argument "would have more force" if they had pressed for a federal common law rule to be applied. Pet. App. 11a. But they did not do that. See page 3, *supra*. Therefore, the "coincidental fact" that Ohio's particular rule overlaps with CERCLA's standard for applying "direct" liability presents no question under *Bestfoods* warranting review by this Court.

Nor is there any risk that "the central holding of *Bestfoods* will be gutted." Pet. 12. Ohio's rule only applies

here because petitioners did not press the more interesting issue of whether a federal common law rule should be adopted. Having failed to raise that issue, their complaint reduces to carping over the proper application of Ohio law, which is inherently unworthy of review by this Court. Sup. Ct. R. 10.

2. Petitioners attempt to make a mountain out of the molehill of the court of appeals' refusal without opinion to certify the question of whether a transaction-specific theory of liability is available under Ohio law governing piercing the corporate veil. In contrast to the extended discussion of the issue presented here, petitioners devoted scant attention to this issue below. The motion, which is reproduced in full in the appendix, clearly indicates that the certification issue is a matter firmly committed to the court of appeals' discretion. App. 3a. Thus, petitioners should not be heard to complain that the court below ignored the various precedents cited here, which petitioners never bothered to cite in their papers below.

Moreover, it is clear that the court of appeals did not abuse its discretion in declining to seek guidance from the Ohio Supreme Court and that its decision in the unique circumstances posed here does not remotely conflict with the holdings of this Court or any other court of appeals.

Petitioners assert (Pet. 12-20) that other courts of appeals would have certified the state-law question of whether there is a transaction-specific use of the veil-

piercing doctrine in Ohio. But the cases cited by petitioners arise in vastly different circumstances. The situation here – where the state supreme court has announced the proper general standard and the only intermediate appellate courts that have addressed the specific problem have reached the same result – is not presented by any of the cases relied upon by petitioners. In *Liriano* v. *Hobart Corp.*, 132 F.3d 124, 132 (2d Cir. 1998), the court held that certification was appropriate because there were "at least two divergent views of the law to be found in the intermediate New York courts." There are no divergent holdings in the Ohio courts and petitioners do not claim that there are. Instead, they divine differing views based solely on broad recitations of legal standards in cases that did not pose the transaction-specific issue. Those appellate courts that actually have addressed that issue consistently have reasoned that the corporate veil can be pierced.

In *Grubbs* v. *Gulf International Marine, Inc.*, 985 F.2d 762, 763 (5th Cir. 1993) (per curiam), the Fifth Circuit interpreted a Louisiana Supreme Court opinion in a particular way, but then two intermediate appellate courts handed down decisions casting doubt on that interpretation. Here, the Sixth Circuit's ruling is completely in accord with the holdings of the Ohio courts of appeals. Similarly, in *Blanchard* v. *State Farm Mutual Automobile Insurance Co.*, 903 F.2d 1398, 1399 (11th Cir. 1990), the court certified because there was "a division in the reasoning among the Florida district courts of appeal" and both parties had urged the court to certify the question. That situation bears no resemblance to this case. Finally, in *Colonial Properties, Inc.* v. *Vogue Cleaners, Inc.*, 77 F.3d

384, 386-87 (11th Cir. 1996), the question involved a matter "of first impression under Alabama law," which is the basis for that court's observation about having to " 'guess[ ]' " as to what the state's law is. Here, the Ohio courts have eliminated the guesswork by uniformly applying the State supreme court's general rule to the specific situation posed. Thus, *Colonial Properties* is plainly distinguishable. In sum, there is no conflict among the circuits that might otherwise warrant this Court's attention.

Moreover, every case cited by petitioners arose under the federal courts' diversity jurisdiction, which is when forum shopping is likely to be a serious concern. See *Hanna* v. *Plumer*, 380 U.S. 460, 468 (1965). Here, the issue arises in connection with a claim arising under CERCLA, which typically would be presented in federal court in any event. Thus, even the policy concerns underlying certification generally that are cited by petitioners (Pet. 16-17) are not implicated here at all. Accordingly, the mundane exercise of discretion not to certify a question to the Ohio Supreme Court in the context of a CERCLA contribution action does not remotely warrant certiorari.

* * *

Ultimately, the court of appeals recognized that the doctrine of piercing the corporate veil in Ohio, as elsewhere, is designed to protect against " 'harm, injustice, or fundamental unfairness' " when it arises in connection with abuse of the corporate form. Pet. App. 8a (quoting *AT&T Global Info. Solutions Co.* v. *Union Tank Car Co.*, 29 F. Supp. 2d 857, 868 (S.D. Ohio 1998)). Denune's illegal activities, which required extraordinary control of the

corporation during a period of almost four years, directly implicate those concerns. As the Sixth Circuit said:

> Can it be that the shareholder is immunized from personal liability if he causes the corporation to commit an illegal act, no matter the degree of his control over the corporation with regard to the illegal act, no matter the harm to third parties, and no matter the other equities? Neither we nor the Ohio courts hold that such immunity exists.

Id. In sum, holding Denune liable was both imminently fair and based on both legal standards and principles of justice embodied in Ohio law. In that situation, further review by this Court is manifestly not appropriate.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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May 11, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CARTER-JONES LUMBAR COMPANY	:	
Plaintiff-Appellee and Cross Appellant	:	Case Number 99-4241
v.	:	
LTV Steel Company, et al.	:	
Defendants,	:	
Dixie Distributing Company; Harry C. Denune,	:	
Defendants-Appellants	:	

MOTION OF APPELLANTS, HARRY C. DENUNE AND DIXIE DISTRIBUTING COMPANY, FOR AN ORDER TO CERTIFY A QUESTION OF STATE LAW

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure and Rule XVIII of the Rules of Practice of the Supreme Court of Ohio, appellants, Harry C. Denune and Dixie Distributing Company ("Appellants"), hereby respectfully request this court to issue a certificate order to the Supreme Court of Ohio to answer a question of Ohio law. The reasons for this motion are more fully set forth in the accompanying memorandum.

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MEMORANDUM IN SUPPORT OF MOTION

Rule XVIII of the Rules of Practice of the Supreme Court of Ohio provides as follows:

> The Supreme Court may answer a question of law certified to it by a court of the United States. This rule may be invoked when the certifying court, in a proceeding before it, determines there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of this Supreme Court, and issues a certification order.[1]

The proceeding at bar relates to the issue of whether it is appropriate to pierce the corporate veil of a corporation and hold a shareholder liable for a corporate debt under Ohio common law. The seminal case on this issue from the Ohio Supreme Court is *Belvedere Condominium*

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[1] A copy of Ohio SCt R XVIII is attached hereto as Exhibit A.

Unit Owners Association v. R.E. Roark, 67 Ohio St.3d 274 (1993). In *Belvedere*, the Ohio Supreme Court announced a three pronged test to determine whether a creditor is entitled to pierce the corporate veil. The first prong of that test is whether "control over the corporation by those to be held liable was so complete that the corporation has no separate mind, will, or existence of its own." *Belvedere* at 289. However, since the issuing of the *Belvedere* decision, there is a question as to whether the corporate veil may be pierced based upon the shareholder's control over a single transaction or whether a court, in determining whether to pierce the corporate veil, is required to utilize a broad based analysis to consider whether the first prong of the test set forth in *Belvedere* has been met.

The instant appeal involves the foregoing question. In their brief, Appellants have argued that control over a single transaction is not sufficient to pierce the corporate veil since a broad based analysis of the relationship between the corporation and a shareholder is required. In its brief, Appellee argued that under the *Belvedere* test, piercing the corporate veil can be based upon a single transaction.

In light of the foregoing, Appellants believe that there is a lack of controlling precedent from the Ohio Supreme Court on this issue and this is a question of Ohio law that requires consideration by the Supreme Court of Ohio.

The decision of whether or not to utilize the certification procedure is discretionary. This procedure has been

used previously by this court when it is deemed appropriate. *Planned Parenthood Assoc. v. McWherter,* 923 F. 2d 2474 (6th Cir. 1991). Appellants respectfully submit that the fact pattern presented in the case at bar presents an appropriate model for the Ohio Supreme Court to consider with respect to the analysis of the first prong of *Belvedere* and the policy implications for recognizing whether or not it would be appropriate under Ohio law for a creditor to pierce the corporate veil based upon control of a single transaction. Counsel for Appellants will prepare a proposed certification order upon instructions from this court.

FOR THE FOREGOING REASONS, appellants' motion to certify is well taken and should be sustained.

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CERTIFICATE OF SERVICE

The undersigned, Attorney for Defendants-Appellants, Harry C. Denune et. al., hereby certifies that a true and accurate copy of the foregoing Motion was served upon John A. Daily, Attorney for Plaintiff-Appellee, Daily & Schnars, 3570 Executive Drive, Suite 202, Uniontown, Ohio 44685-0867, by ordinary U.S. Mail, postage prepaid, this 17th day of March, 2000.

/s/ Keith A. Kavinsky
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Supreme Court, U.S.
FILED
MAY 25 2001
OFFICE OF THE CLERK

(3)

No. 00-1615

In the Supreme Court of the United States

DIXIE DISTRIBUTING COMPANY; HARRY C. DENUNE

Petitioners,

v.

CARTER-JONES LUMBER CO.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

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6 pp

PETITIONERS' REPLY BRIEF

Respondent does not take issue with our legal arguments and makes no effort to explain why the questions presented are not worthy of this Court's review. Instead, respondent has chosen to oppose certiorari solely on the remarkable ground that the important questions raised in the petition "simply are not posed" by this case. Br. in Opp. 1. Thus, respondent declares without explanation that "[t]he only question actually posed in this case is whether the Sixth Circuit properly applied Ohio's common law standards governing piercing the corporate veil." *Ibid.*

But that is simply not true. The questions presented in the petition — whether the Sixth Circuit violated *United States* v. *Bestfoods*, 524 U.S. 51 (1998), by premising indirect CERCLA liability on the corporate shareholder's control over the specific wrongful acts, and whether the Sixth Circuit should have certified the key issue of Ohio law to the Supreme Court of Ohio — were explicitly raised and ruled on below. See Pet. App. 10a-12a. They are issues of federal law, and they are dispositive of this case. Respondent cannot make them go away by counterfactual *ipse dixit*, and its wishful thinking is no substitute for a valid reason to deny certiorari — something that is conspicuously absent from the Brief in Opposition.

1. As to the first issue, respondent seeks to avoid the irreconcilable conflict with *Bestfoods* by claiming that, because the parties stipulated that Ohio law governs the veil-piercing inquiry, the question whether *Bestfoods* permits the use of transaction-specific veil piercing under state law has been waived. Br. in Opp. 1, 5-6. But that is a non-sequitur. The parties agreed only that state law (as opposed to federal common law) governs the question whether Denune exercised sufficient control over the Dixie corporation as a whole to warrant piercing the corporate veil under *Bestfoods*. Petitioners most certainly did not stipulate to the applicability of other rules of Ohio law that might permit veil-piercing in entirely different circumstances. Indeed, the Sixth Circuit expressly recognized

that whether it violates *Bestfoods* to apply in a CERCLA case a state law rule that permits derivative liability based solely on the shareholder's control over the wrongful transaction is an issue of federal law that has been preserved and placed at issue in this case. Pet. App. 10a-11a.

Leaving that red herring aside, respondent has offered no reason why this issue does not warrant this Court's review. As we explain in our petition (at pages 9-12), *Bestfoods* holds that CERCLA looks to the common law *only* to answer the question whether the shareholder's control over the corporation as a whole was sufficient to pierce the corporate veil. Whether the common law of a particular state also allows veil-piercing on a transaction-specific basis is simply irrelevant. Not only does CERCLA not incorporate any such rule, but to allow derivative CERCLA liability on that basis would run directly contrary to the central holding of *Bestfoods* — that the test for derivative liability must focus on the shareholder's control over the corporation, and must be kept distinct from the test for direct liability, which focuses on the shareholder's control over the transaction. Notwithstanding its blithe declaration that "this is a garden variety application of *Bestfoods* and in no event conflicts with that decision," respondent makes no effort whatsoever to address this argument. Br. in Opp. 5.[1]

2. As for the second issue — whether the Sixth Circuit should have certified the key issue of Ohio law to the Supreme

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[1] Respondent's obfuscation culminates in its argument that this Court should deny certiorari because petitioners have not raised the question whether federal common law governs the veil-piercing inquiry. Br. in Opp. 5-6. We did not raise that issue because it is not presented here. Our point is and has always been that, *regardless of whose common law is applicable*, under *Bestfoods*, CERCLA incorporates only the common law test for determining whether the shareholder's control over the corporation as a whole is sufficient to warrant derivative liability.

Court of Ohio — respondent opposes certiorari on the ground that the decision whether to certify "is a matter firmly committed to the court of appeals' discretion." Br. in Opp. 6. Indeed, it is. But this Court has not hesitated in the past to grant certiorari to review discretionary decisions of the lower courts. See, *e.g.*, *Zafiro* v. *United States*, 506 U.S. 534 (1993) (considering whether district court abused its discretion in denying severance under Fed. R. Crim. P. 14); *Blum* v. *Stenson*, 465 U.S. 886, 892 (1984) ("We granted certiorari to consider * * * whether the district court abused its discretion"). Given the momentous federalism issues raised by the discretionary decision whether or not to certify (see Pet. 13, 16-17), there is a dire need for the Court to issue guidance to the courts of appeals to cabin their exercise of that discretion.

In the absence of such guidance, the courts of appeals have adopted conflicting standards, some of which reflect a woefully inadequate respect for the sovereignty of state courts. See Pet. 18-20. Respondent is able to argue that there is no conflict among the circuits only by ignoring the holdings and language of the decisions of the other courts of appeals and by misrepresenting the significance of the Sixth Circuit's holding, pretending that the Ohio case law is in perfect harmony when it plainly is not.

Notwithstanding respondent's assertion to the contrary (Br. in Opp. 7), it is simply incontestible that this case involves an issue of Ohio law governed by a broadly-worded decision of the Ohio Supreme Court that is in tension with more specific decisions of the state's intermediate appellate courts. See Pet. 14-16. And despite respondent's rosy declaration that all of the Ohio appellate court decisions on point reach the same conclusion (Br. in Opp. 7), it is crystal clear that several such decisions seemingly foreclose the result reached below. See Pet. 19-20. Here again, respondent's wishful *ipse dixit* is no reason to deny review.

In these precise circumstances, many other circuits have found it appropriate to certify. See Pet. 18-20; *Liriano* v. *Hobart Corp.*, 132 F.3d 124, 132 (2d Cir. 1998); *Grubbs* v. *Gulf Int'l Marine, Inc.*, 985 F.2d 762, 763 (5th Cir. 1993); *In re KF Dairies, Inc.*, 179 F.3d 1226, 1226-27 (9th Cir. 1999); *Blanchard* v. *State Farm Mut. Ins. Co.*, 903 F.2d 1398, 1399 (11th Cir. 1990). The decision below cannot be squared with these holdings.

Indeed, respondent completely ignores the Second Circuit's holding in *Liriano* that "[c]ertification is particularly appropriate when * * * there is some law in the intermediate state courts, but no definitive holding from the state's highest tribunal" (132 F.3d at 132), as well as the Eleventh Circuit's rule that concerns for federalism require certification whenever "'there is *any doubt* as to the application of state law'" (*Colonial Properties, Inc.* v. *Vogue Cleaners, Inc.*, 77 F.3d 384, 387 (11th Cir. 1996) (emphasis added)). Even if respondent's characterization of the state of Ohio law were accurate — and it plainly is not — certification would clearly still be appropriate here under either of those standards. As such, this issue is ripe for Supreme Court review and this case presents a perfect vehicle for resolving the conflict.

Respondent's final argument in opposition to review is that the policy concerns that favor certification (see Pet. 16-17) are not implicated here because federal jurisdiction in this case is based on the existence of a federal question, rather than the diversity of the parties (Br. in Opp. 8). That argument completely misses the mark.

The basis for federal jurisdiction is irrelevant. What matters is that the dispositive issue of state law — the circumstances under which the corporate veil may be pierced — is one that can arise in many different contexts, not just in litigation under CERCLA. The Sixth Circuit's decision will lead to significant forum shopping because, from this point on, any plaintiff

seeking to pierce the corporate veil in Ohio, whether his cause of action sounds in tort, in contract, or otherwise, will bring suit in federal court whenever possible in order to get the benefit of the Sixth Circuit's dubiously generous reading of Ohio law, and in order to ensure that the Ohio Supreme Court will not be given the opportunity to vindicate its decision in *Belvedere Condominium Unit Owners' Ass'n* v. *R.E. Roark Cos.*, 617 N.E.2d 1075 (Ohio 1993), and to dictate for itself the public policy of the State of Ohio regarding shareholder liability. The Court should grant certiorari to discourage this behavior, to protect our federalism, to resolve the conflict in the circuits, and to provide much-needed guidance on when it is appropriate to certify issues of state law to the state's highest court.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2001